EDITOR'S NOTE

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. 85-1517-CSY
atus: GRANTED

Title: Colorado, Petitioner
v.
John Leroy Spring

cketed:
rch 14, 1986

Court: Supreme Court of Colorado

Counsel for petitioner: Phelan, Maureen

Counsel for respondent: Van Cleave III, Thomas M., Benezra, Seth Jeremy

try	Date	Note	Proceedings and Orders
1	Mar 14 1986	G	Petition for writ of certiorari filed.
2	Feb 12 1986		Application for stay filed (A-619).
3	Feb 16 1986		Application for stay denied by White, J., without prejudice to its renewal in connection with the timely filing of a petition for certiorari on or before March 14, 1986.
4	Feb 16 1986		
5	Mar 17 1986		Application for recall and stay filed.
6	Mar 19 1986		Justice White has indicated that unless there is some reason to do otherwise, the stay application will be acted along with the petition for certiorari.
7	Mar 19 1986		
8	Apr 14 1986		Brief amicus curiae of Indiana, et al. filed.
9	Apr 16 1986		DISTRIBUTED. May 2, 1986
10	Apr 15 1986	X	Brief of respondent John Leroy Spring in opposition filed.
11	Apr 15 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
12	May 5 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
13	May 5 1986		The petition for writ of certiorari is granted limited to Question 1 presented by the petition. The application for stay presented to Justice White and by him referred to the Court is granted pending the issuance of the mandate of this Court.
			**********
14	Jun 16 1986		Order extending time to file brief of petitioner on the merits until July 18, 1986.
15	Jun 17 1986		Record filed.
16	Jun 17 1986		Certified copy of original record, 6 volumes, and exhibits received. (Box).
17	Jul 3 1986		Brief amicus curiae of California, et al. filed.
18	Jul 18 1986		Brief amicus curiae of United States filed.
19	Jul 18 1986		Brief of petitioner Colorado filed.
20	Jul 24 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Aug 1 1986		Order extending time to file brief of respondent on the merits until September 15, 1986.
22	Sep 24 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Sep 17 1986		Brief amicus curiae of Criminal Defense Bar, Inc. filed.
24	Sep 15 1986		Brief of respondent John LeRoy Spring filed.
25	Oct 6 1986		SET FOR ARGUMENT. Tuesday, December 9, 1986. (3rd case)

No. 85-1517-CSY

Entry	Date	Note	Proceedings and Orders
			(1 hour).
52	Oct 22 1986		CIRCULATED.
53	Dec 1 1986	X	Reply brief of petitioner Colorado filed.
54	Dec 9 1986		ARGUED.

85-1517

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE STATE OF COLORADO,

Petitioner,

vs.

JOHN LEROY SPRING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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ISSUES PRESENTED FOR REVIEW

1. Does a valid waiver of the right to silence and the right to counsel necessarily require that the defendant be aware, prior to interrogation, of all of the possible subjects of interrogation?

2. Where a warned suspect has waived his rights and has agreed to answer questions, but then refuses to answer a particular quesition, does the Constitution impose a duty on the police to stop interrogation and to determine whether the suspect is exercising his privilege against self-incrimination in all respects?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTION

OTHER AUTHORITIES

OPINION BELOW

The trial court's unreported ruling is included as Appendix A; the Colorado Court of Appeals' opinion is reported at 671 P.2d 965 (1983), and included as Appendix B; the opinion of the Colorado Supreme Court is not yet reported, but is included as appendix C; the Order modifying the opinion and denying rehearing is attached as Appendix D.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. sec. 1257 and rule 17.1(b) and (c) of the Rules of the Supreme Court.

The judgment of the Colorado Supreme Court was issued on October 2, 1985. The state's timely petition for rehearing was denied on January 13, 1986. The Colorado Supreme Court did not rely on any independent state ground for its decision; rather it based its decision upon *Miranda v. Arizona*, 384 U.S. 436 (1966), and subsequent cases interpreting the *Miranda* decision.

CONSTITUTIONAL PROVISIONS

Amendment V of the United States Constitution provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

Amendment XIV, section 1 of the United States Constitution provides in pertinent part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law. ...

FACTUAL BACKGROUND

In early February 1979, the respondent John Spring and Donald Wagner invited Donald Walker to accompany them elk hunting in the snowy mountains west of Craig, Colorado. Neither man liked Walker, because they believed he was a "snitch". In addition, Walker had dated the respondent's wife while the respondent was in prison.

The respondent suggested to Walker that Walker leave his .22 automatic pistol in the van. Then, while Walker approached a ravine to "pick an elk," the respondent shined a flashlight on him. Wagner shot him twice in the head. The two men then dragged the body to a ditch and kicked snow over it.

The respondent and Wagner later bragged about their deed to another friend, George Dennison, who proved to be an informant working with agents of the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). Dennison related the information concerning the Colorado homicide (and other information concerning illegal gun transactions) to these agents.

On March 30, 1979, the respondent was arrested by ATF agents on federal firearms charges, and was twice advised of his constitutional rights. In addition, he was advised that if he decided to answer questions without the assistance of an attorney, he had the right to stop the questioning at any time or to stop the questioning until the presence of an attorney could be secured. The respondent was not specifically advised that he might be a murder suspect. He signed a written waiver form. He was then interrogated concerning the firearms violations. Toward the end of this interrogation, the respondent was asked if he

had a criminal record. He replied that he had a juvenile record, acquired at the age of 10 when he killed his aunt. The agent then asked if he had ever shot anyone else. The respondent ducked his head and mumbled, "I shot another guy once." The agent asked the respondent if he had ever been to Colorado; the respondent replied, "No." Finally, the agent asked whether the respondent had shot a man named Donny Walker west of Denver and thrown the body in a snowbank. There was a long pause, then the respondent ducked his head and said, "No." The interview was then ended.[1]

On July 13, 1979, the same ATF agents again visited the respondent at the Kansas City jail. By that time, an information charging him with murder had been filed in Colorado, and he had entered a plea of guilty in the federal firearms case. The agents stated that they wished to talk to the respondent to "clean up some loose ends," and to discuss the hiding places of other firearms, and the identities of firearms "fences" in Kansas City. The respondent was again

1 This first statement was never used at trial because the trial court ruled that the statement "I shot another guy once" was not relevant. The court ruled that the statement denying the Walker homicide was relevant, but the prosecution chose not to use it at trial.

The Colorado Supreme Court, citing *Wong Sun v. United States*, 371 U.S. 471 (1963), ruled that even though the first statement was not used, its constitutionality remained at issue because if it was illegally obtained, the prosecution must establish that the two subsequent statements were not the product of the tainted statement. This affected an otherwise unchallenged statement made by the respondent on May 26, 1979 (in which the respondent admitted his participation in the crime), as well as the statement of July 13, 1979, the second statement discussed in this brief. The Colorado Supreme Court later amended its opinion by the addition of footnote 6, stating that upon remand, the prosecutor would be free to assert to the trial court that under *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), the two subsequent statements would be admissible without regard to attenuation. However, since the trial court has already ruled that both subsequent statements were voluntary, *Oregon v. Elstad* obviates a remand; the statements clearly are admissible as a matter of law.

advised of his *Miranda* rights, and the additional warning that he had the right to stop questioning at any time. He acknowledged that he understood his rights, but refused to sign any form without his attorney. The agents closed up their clipboards and stood to leave. The respondent stopped them, saying that he knew his rights, he did not want to sign anything, but he was willing to talk with them. The agents resumed the interview.

The July 13 interrogation included discussion of various firearms and explosives, general conversation concerning the respondent's activities in Colorado, the Colorado homicide, and other homicides and crimes of which the respondent was suspected. The respondent appeared relaxed. On some topics he was talkative, on others, not talkative. He was told that if he wanted to answer the questions, that was fine, but that he did not have to. He replied that he understood that. On the topic of the Walker murder, several questions were not answered, several were answered with a shrug of the shoulder, and once or twice the respondent replied, "I'd rather not talk about that." Some of the additional murders and crimes he denied. To questions concerning others he replied, "I don't want to talk about that." The respondent did not request that all questioning end or that the agents leave. He did not request an attorney. Each time that the respondent said that he would rather not talk about that, the agents went on to a different question, which the respondent readily answered. During this conversation, the respondent revealed little that the authorities did not already know. However, he did inform them that the .22 caliber gun which he had been carrying at the time of his arrest he had taken from Walker when Walker died.

STATE COURT PROCEEDINGS

The respondent filed a pretrial motion to suppress the statements. At a hearing conducted on this motion on March 17, 1980, the trial court ruled that all of the statements were admissible.

On appeal, a divided court of appeals ruled that the statements were inadmissible. *People v. Spring*, 671 P.2d 965 (Colo. App. 1983). The court of appeals imposed a *per se* rule, requiring that the police specifically inform the suspect of the crime of which he is suspected; without such a warning, the court reasoned, there could be no knowing and intelligent waiver of rights. The court of appeals also excluded the other statement, concluding that by refusing to answer some questions regarding the homicide, the respondent was exercising his right to silence as to all matters concerning the homicide. Additionally, the court of appeals held that since the agents did not initially state that the murder would be a topic of interrogation, the respondent was entitled to renewed *Miranda* warnings when they questioned him about the murder.

A majority of the Colorado Supreme Court affirmed the court of appeals, on somewhat different grounds. Concerning the first statement, the Court ruled that in determining whether a waiver is valid, whether and to what extent a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is a major (and in some cases determinative) factor. Reasoning that on March 30, 1979, the respondent had no reason to suspect that the federal ATF agents would question him about a Colorado homicide, the Court ruled that the People failed to prove that he made a voluntary, knowing and intelligent waiver of his constitutional rights. Concerning the state-

ment of July 13, 1979, the Colorado Supreme Court ruled that it was inadmissible because, "Once the defendant has indicated in any way that he does not want to answer a question or questions, the interrogating officers have an affirmative and emphatic duty to determine whether the suspect is in fact exercising his privilege against self-incrimination in all respects, or is merely reluctant to answer particular questions."

REASONS TO ALLOW THE WRIT

This court should issue its writ and review the holding of the Colorado Supreme Court because the Colorado court has decided two important questions of United States Constitutional law in a way that by all indications would not be sanctioned by this court. The two issues highlight different aspects of the law of waiver, aspects which continually recur; both issues have been treated in widely disparate ways by the state and federal courts. The manner in which the Colorado court resolved these issues will have far-reaching implications for the use of confessions in criminal trials. A decision by this court is necessary in order to clarify and explain its prior holdings, to provide clear guidelines to law enforcement officers, and to develop the law surrounding waivers of fifth amendment rights.

The first question presented by this case is whether a suspect in custody who has been properly advised of his *Miranda* rights, but not advised of the nature of the crime or crimes of which he is suspected, can make a knowing and intelligent waiver of his rights. Because some of the lower federal and state courts, including Colorado, have confused the distinction between the requirement that a waiver be knowing and intelligent (which addresses those matters of

which the suspect must be aware) and the requirement that the waiver be voluntary (which addresses the need for the decision of the suspect to be free from improper influences), much of the case law on the point is either unclear or not well reasoned. In addition, even those jurisdictions which have made the distinction do not agree concerning the nature and extent of the information of which the suspect must be aware before he can knowingly and intelligently waive his rights. Consequently, the various jurisdictions have reached widely different results in situations which are factually similar.

Some jurisdictions have held that information concerning the possible charges is not relevant in determining the validity of a waiver.[2] At the opposite end of the spectrum, several have adopted a *per se* rule, much like the Colorado Court of Appeals, requiring that the suspect be told the exact nature of the charges upon which he will be questioned.[3] A number of courts, including the Colorado Supreme Court, follow a rule that the suspect's knowledge of the crime is a significant factor to be considered in

2 *United States ex rel. Henne v. Fike*, 563 F.2d 809 (7th Cir. 1977); *United States v. Anderson*, 533 F.2d 1210 (D.C. Cir. 1976); *United States v. Campbell*, 431 F.2d 97 (9th Cir. 1970); *James v. State*, 230 Ga. 29, 195 S.E.2d 448 (1973); *People v. Merchel*, 91 Ill. App. 3d 285, 414 N.E.2d 804 (1980); *State v. Woods*, 117 Wis. 2d 701, 345 N.W.2d 457 (1984).

3 *Schenk v. Ellsworth*, 293 F. Supp. 26 (D. Mont. 1968); *Commonwealth v. Collins*, 436 Pa. 114, 259 A.2d 160 (1969); *see also Commonwealth v. Richman*, 458 Pa. 167, 320 A.2d 351 (1974); *State v. Goff*, 289 S. Ed. 2d 473, 477 n.8 (W. Va. 1982).

determining the validity of the waiver.[4] Several courts have adopted the "totality of the circumstances" rule, but then have held that a defendant who actually did not know the true nature of the charges against him was nonetheless able to render a knowing and intelligent waiver.[5] This is an issue which has been considered often, but upon which there is no agreement; clearly the jurisdictions are struggling with the concept of waiver in the context of fifth amendment rights.

It is not apparent why the lower federal and state courts are in such disarray, since the decisions of this court do indicate the exact information which must be given to a suspect to support a knowing and intelligent waiver. Many years ago, this court defined a waiver as the intentional and voluntary relinquishment of a known right. *Johnson v. Zerbst*, 304 U.S. 458 (1938). *Miranda v. Arizona*, 384 U.S. 436 (1966), set forth specifically the four warnings which must be given to a suspect in custody before his waiver of rights can be considered knowing and intelligent. The suspect must be warned that he has the right to remain silent and to have an attorney present; it must further be explained that if he cannot afford an attorney, one will be appointed for him. The suspect must also be warned of the consequences of waiving these rights: *i.e.*, anything he says

4 *Carter v. Garrison*, 656 F.2d 68 (4th Cir. 1981), *cert. denied*, 455 U.S. 952; *Collins v. Brierly*, 492 F.2d 735 (3rd Cir. 1974), *cert. denied*, 419 U.S. 877; *People v. Spring*, 83SC145 (Colo. Dec. 2, 1985); *State v. Falby*, 187 Conn. 6, 444 A.2d 213 (1982); *State v. Williams*, 434 So.2d 967 (Fla. App. 1983); *People v. Murphy*, 17 Ill. App.3d 482, 308 N.E.2d 235 (1974); *State v. Condon*, 468 A.2d 1348 (Me. 1983) *cert. denied*, 104 S. Ct. 2385; *State v. Jones*, 125 N.H. 490, 484 A.2d 1070 (1984); *State v. Stearns*, 620 S.W.2d 92 (Tenn. Crim. App. 1981); *see also United States v. McCrary*, 643 F.2d 323 (5th Cir. 1981).

5 *Lewis v. United States*, 483 A.2d 1125 (D.C. App. 1984); *Commonwealth v. Tatro*, 4 Mass. App. 295, 346 N.E.2d 724 (1976); *State v. Carter*, 296 N.C. 344, 205 S.E.2d 263 (1979).

can and will be used against him in a court of law. Nowhere in *Miranda* is there any indication that the suspect must be given any other specific warning or information, such as the nature or elements of the crime, the full extent of the knowledge of the police, or the possible consequences of conviction. If a properly warned suspect understands these rights and consequences, but chooses to forego his rights without any persuasion by the authorities, then, under *Johnson v. Zerbst*, *supra*, and *Miranda*, he has intentionally and voluntarily relinquished his known rights.

Some of the confusion in the state and lower courts appears to have been generated by this Court's reference in *Miranda* and subsequent cases to the requirement that the suspect understand the consequences of waiving his rights. *Fare v. C*, 442 U.S. 707, 725 (1979) (the reviewing court must evaluate whether the suspect "has the capacity to understand ... the consequences of waiving those rights.") For example, Colorado relied upon *United States v. McCrary*, 643 F.2d 323, 328-29 (5th Cir. 1981) and *Commonwealth v. Collins*, 436 Pa. 114, 259 A.2d 160, 163 (1969) in holding that a knowing and intelligent waiver must be supported by actual knowledge of the charges, because the consequences of waiver will differ depending on the severity of the charges. The inference is that unless the suspect knows the charges, he cannot understand all of the possible legal consequences that a waiver of his rights might produce.

These courts have gone too far afield. *Miranda* clearly stated that the warning that any statement made by the suspect can and will be used against him is necessary in order to make the suspect aware of the consequences of foregoing his rights. 384 U.S. at 469. This means that the

suspect need not be aware of *all* of the possible legal consequences of waiver—only of the consequence that his statements will be used against him.

This conclusion is supported by the recently decided case of *Moran v. Burbine*, No. 84-1485 (U.S. March 10, 1986), where the suspect was not told that an attorney hired by his relatives was available to him. In holding that *Miranda* imposed no duty on the authorities to inform the suspect of this fact, the Court wrote:

> No doubt, the additional information would have been useful to the respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

Accord: Oregon v. Elstad, 105 S.C. 1285, 1297 (1985).

Clearly, the only information required by the United States Constitution for a knowing and intelligent waiver of fifth amendment rights is the knowledge of those rights, and the understanding that the consequence of waiver is that any statements made may be used against the suspect.

In this case, the Supreme Court of Colorado held that a suspect cannot knowingly and intelligently waive his rights unless he has some knowledge of the crime upon which questioning will focus, as the knowledge will have an "impact" on the suspect's decision of whether or not to waive

his constitutional rights.[6] Colorado has not stated why this particular information has assumed a constitutional status, whereas other information, equally or more pertinent, has not. There are numerous facts, the knowledge of which could have a major impact on a decision whether or not to waive constitutional rights: the elements of the crime, the possible penalties, even the district attorney's or the local judges' attitudes toward repentant as opposed to recalcitrant offenders—yet neither the Constitution nor *Miranda* requires that such information be supplied. "Knowing and intelligent" does not mean that the suspect knows all of the information which a careful attorney would demand before determining whether waiver would be the wisest course of action under the circumstances. It is not in the sense of shrewdness or wisdom that *Miranda* speaks of an "intelligent" waiver; a waiver is "intelligent," even if foolish, where it is made with a full understanding of the option to remain silent and to consult an attorney, and of the consequences—that the statement may be used against the suspect. *Collins v. Brierly*, 492 F.2d 735, 738-39 (3rd Cir. 1974), *cert. denied*, 419 U.S. 877.

The Colorado court erroneously shifted its focus from the suspect's knowledge and understanding of his rights to the suspect's knowledge of his circumstances. Rather than determining whether the suspect knew that he had a right to silence and to an attorney, the Colorado court focused on whether the defendant knew exactly which of his prior crimes the law enforcement officials planned to discuss

6 The Colorado Supreme Court did not specify in the opinion whether the lack of knowledge affected the knowingness, the intelligence, or the voluntariness of the waiver, but held that "the People did not meet their heavy burden of proving that Spring's answers ... were made after a voluntary, knowing and intelligent waiver of rights."

with him. Thus, it is clear that Colorado, without justification, has imposed a requirement under the guise of federal law which is far more strict than any requirement ever contemplated by this court. Such a requirement adds no protection to the suspect's fifth amendment right not to be compelled to testify against himself, yet hinders law enforcement and excludes reliable and probative evidence, at a great cost to society.

The second issue presented by this case is whether a duty of inquiry must be imposed on interrogating officials when a suspect who has waived his rights and agreed to interrogation refuses to answer a specific question.

In this case, the Colorado Supreme Court held that once a suspect has in *any way* indicated that he does not wish to answer a question or questions, interrogating officers have an affirmative and emphatic duty to determine whether he is exercising his privilege against self-incrimination in all respects, or is merely reluctant to answer particular questions.[7] Under a literal reading of this rule, even a clear, unambiguous statement clarifying which areas the subject does wish to speak about and which areas he does not wish to speak about would impose an absolute duty on the police to suspend questioning and redetermine the intent and extent of the defendant's waiver. Colorado stands alone in imposing, as a matter of federal

7 The statement "I would rather not answer that" does not suggest in any way that the suspect was invoking his right to counsel. Even if ambiguous, at most it suggests that the suspect might have meant to assert his right to silence. Therefore, *Edwards v. Arizona*, 451 U.S. 477 (1981) does not apply to this case.

constitutional law, such a requirement where the suspect has clearly refused to answer only a particular question.[8]

This court has never stated that a suspect may not exercise his right to silence selectively. In *Fare v. C., supra*, the court noted in passing that "(A)t some points (the suspect) did state that he did not know the answer to a question put to him or that he could not, or would not, answer the question, but these statements were not assertions of his right to remain silent." 442 U.S. at 727. This infers that a defendant has the right to state that he will not answer a question; such a statement, clearly directed to a particular question, does not impose any particular duty of clarification on the police. *See Michigan v. Moseley*, 423 U.S. 96 (1975), where this court noted that a suspect can control the subjects discussed, yet made no mention of any particular duty imposed on the police in the event that the suspect chooses not to answer a question on a particular subject. To the extent that the Colorado rule is taken literally, then, it imposes a much greater restriction upon the police, as a matter of federal constitutional law, than this court ever has.

In spite of its emphatic language, the Colorado Supreme Court's opinion here arguably could be read to impose a duty of clarification only where a suspect's remark

8 *United States v. Thierman*, 678 F.2d 1331 (9th Cir. 1982); *Taylor v. Riddle*, 563 F.2d 133 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020; *United States v. Joyner*, 539 F.2d 1162 (8th Cir. 1976), *cert. denied*, 429 U.S. 983; *United States v. Vasquez*, 476 F.2d 730 (1973), *cert. denied*, 414 U.S. 836; *United States v. Mattheus*, 417 F. Supp. 813 (E.D. Pa. 1976), *cert. denied*, 459 U.S. 1111; *State v. Anspaugh*, 97 Idaho 519, 547 P.2d 1124 (1976); *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. House*, 54 Ohio St. 2d 297, 376 N.E.2d 588 (1978).

is ambiguous.[9] Even in this instance, however, the states and circuits do not agree on the rule to be applied; a number of courts have held that, at least where the defendant is possessed of normal communication skills, it will be assumed that if he wished to reassert his rights after a waiver, he would do so in clear language. Consequently, an ambiguous remark may be ignored by the police.[10] Other jurisdictions have, in the same circumstances, imposed a duty to stop and readvise.[11] Finally, a number of jurisdictions have taken a middle approach: the police, when confronted by an arguably ambiguous statement, may choose to continue interrogation; the court will later determine, upon an examination of the totality of the circumstances, whether the defendant's right to cut off questioning was scrupulously honored as required by *Michigan v. Moseley*, supra.[12]

The decisions of this court to date offer little guidance on the issue. In *Fare v. C, supra*, a juvenile was advised of his rights and then asked to see his parole officer. When the police denied this request, the juvenile stated that he would talk with them without consulting an attorney. The California Supreme Court ruled that this was a *per se* invocation of the fifth amendment right to silence. *In re Michael C.*, 21 Cal. 3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978). Noting that such a request could have different meanings in different circumstances, this Court refused to consider the ambiguous statement as an assertion of rights:

> [I]n the absence of further evidence that the minor intended in the circumstances to invoke his fifth amendment rights by such a request, we decline to attach such overwhelming significance to this request.

Fare v. C., supra, 442 U.S. 724.

This language is itself ambiguous; it can be read to require that in a situation where only an ambiguous statement has been made, the suspect must prove that he intended to invoke his rights thereby, or it could be read as imposing a totality of the circumstances rule. What the case clearly did *not* do was impose any duty of readvisement or clarification upon the police in the face of an ambiguous statement.

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9 The Colorado Supreme Court stated,

> We recognize that an individual might refuse to answer certain questions yet voluntarily and intelligently decide to answer others during the course of a single interrogation, and a waiver established under such circumstances may be valid and effective.

10 *Vail v. State*, 599 P2d 1371 (Alaska 1979); *Reeves v. State*, 241 Ga. 44, 243 S.E.2d 24 (1978); *State v. Nichols*, 212 Kan. 814, 512 P.2d 329 (1973); *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985); *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E.2d 737 (1976). *See also State v. Padilla*, 101 Idaho 713, 620 P.2d 286 (1980); *State v. Bradfield*, 29 Wash. App. 679, 630 P2d 494 (1981). Until *Spring*, the Colorado Supreme Court took this approach. *See People v. Roark*, 643 P2d 756 (Colo. 1982) ("[H]ad the defendant wished to terminate all further interrogation, he easily could have done so by simply stating that he did not want to answer any further questions.")

11 *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985); *United States v. Riggs*, 537 F.2d 1219 (4th Cir. 1976); *United States v. Nielsen*, 392 F.2d 849 (7th Cir. 1968); *State v. Lawson*, 144 Ariz. 547, 698 P.2d 1266 (1985); State v. Ayers, 433 A.2d 356 (Me. 1981), *cert denied*, 104 S. Ct. 1919.

12 *Smith v. United States*, 505 F.2d 824 (6th Cir. 1974); *People v. Hayes*, 38 Cal. 3d. 780, 699 P.2d 1259, 214 Cal. Rptr. 652 (1985); *Shriner v. State*, 386 So. 2d 525 (Fla. 1980); *Conway v. State*, 7 Md. App. 400, 256 A.2d 178 (1969); *People v. Topping*, 426 N.Y.S.2d 116 (App. Div. 3d Dept., 1980); *State v. Woods*, 374 N.W.2d 92 (S.D. 1985); *State v. Despenza*, 38 Wash. App. 645, 689 P.2d 87 (1984).

It appears that, as a matter of federal constitutional law, Colorado has imposed a far more strict duty upon law enforcement personnel than this court would consider to be necessary under the due process clause. Highly probative evidence which is constitutionally unobjectionable is nonetheless being suppressed. Perhaps most importantly, the police have been placed in an impossible position. Under the Colorado rule, they must instantly assess every word uttered by a suspect, for fear that a later, more leisurely review of a cold record may reveal words or phrases which are arguably ambiguous, resulting in the suppression of evidence which in actuality was lawfully obtained.

CONCLUSION

These two issues present important constitutional questions concerning the theory and application of the law of waiver of *Miranda* rights. In *Moran v. Burbine*, supra, this court stated that *Oregon v. Elstad*, supra, foreclosed the argument that the police must inform a suspect in custody of all information relevant to his decision whether or not to waive. It is readily apparent that the state and lower federal courts have not perceived this yet. A significant degree of judicial bewilderment surrounds the second issue, as well. Law enforcement officers in the field are in need of precise rules, so that they may know when interrogation may proceed, and when it may continue. In the meantime, society is suffering by the exclusion of reliable evidence in cases where no violation of a suspect's procedural or substantive rights has occurred. The effects of this case reach far beyond Colorado, because the case was decided on federal rather than state grounds, and will undoubtedly be relied upon in the future by others courts

confronted by the issues raised here.

This court recently accepted certiorari jurisdiction in *Colorado v. Connelly*, No. 85-660 (cert. granted January 13, 1986), which concerns the "voluntary" component of a *Miranda* waiver. The panoply of confused and inconsistent rulings of the lower federal and state courts concerning the "knowing and intelligent" aspect of a *Miranda* waiver demonstrates that there are even more compelling reasons to review this case. A review of *Colorado v. Connelly* and *Colorado v. Spring* together is next, after *Burbine*, in logical progression. The grant of a writ of certiorari in this case would present this court with an opportunity to set forth a full, working definition of the elements required for a knowing, intelligent and voluntary waiver of fifth amendment rights.[13]

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13 If this Court trusts that *Moran v. Burbine* has so clarified the law concerning the "knowing and intelligent" aspect of waiver that no further elucidation is necessary, then the petitioner requests that the writ of certiorari be granted, and that this case be summarily reversed on the application of federal law.

Respectfully submitted,
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IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF MOFFAT AND STATE OF COLORADO

Criminal Action Number 79CR40

PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

JOHN LEROY SPRING,

Defendant.

THIS MATTER came regularly before the Court upon the Defendant's Motion to Suppress evidence and statements made by the Defendant to law enforcement officers and agents, and his Motion to Dismiss Count V of the Information. The matter was heard by the Court on March 17, 1980, commencing at 10:00 a.m. The Defendant appeared in person and was represented by Paul R. Bratfisch and Michael Gallagher, Attorneys at Law. The People were represented by Carroll E. Multz and Richard D. Saba. The Court took the testimony and received documentary evidence presented at the March 17, 1980, hearing and has considered the briefs submitted by respective Counsel and their arguments presented at the hearing, and being now fully advised FINDS, CONCLUDES and ORDERS as follows:

1. John Leroy Spring was arrested on March 30, 1979, in Kansas City, Missouri, by agents of the Bureau of

Alcohol, Tobacco, and Firearms for interstate transportation of stolen firearms, dealing in firearms without a license, and other related offenses. This arrest was made after the ATF agents, acting upon information provided by an informant named George Dennison, had set up a buy and sell transaction for firearms with Spring, and after the transaction had been substantially concluded in a K Mart parking lot in Kansas City, Missouri.

2. Prior to Spring's arrest on March 30, 1979, Dennison had also given information to the ATF agents concerning Spring's statement to Dennison that he (Spring) and another person had killed one Don Walker in Colorado in February, 1979.

3. At the time of Spring's arrest on March 30, 1979, the evidence shows that the ATF agents were acting without an arrest warrant; had arranged the sale through Dennison, and had actively participated in negotiations for the sale and delivery of firearms from Spring to undercover agents in the K Mart parking lot. The officers actually observed the firearms in the trunk of the vehicle in which Spring arrived at the parking lot, and were in the process of transferring the firearms from that vehicle to the ATF undercover vehicle when the arrest was made. Thus there was probable cause for this arrest based both upon the information given by Dennison, and independently upon the direct personal observations of a crime in progress by the ATF agents.

4. At the time of the arrest and incident thereto, the ATF agents conducted a pat down search, and removed a .22 cal. pistol (Exhibit F) from Spring's jacket pocket.

5. Spring was advised by ATF agent Malooly at the scene of the arrest pursuant to the standard Miranda warning. Spring was then transported to the ATF Bureau Office in Kansas City, and was there re-advised of his rights by Agent Sadowski. Spring indicated to Agents Sadowski and Patterson that he understood his rights, and signed a written form waiving and acknowledging his rights in connection with the interrogation by Patterson and Sadowski, which ensued immediately.

6. The thrust of the interrogation conducted by the ATF agents on March 30, 1979, was directed toward the firearm transactions with which they were directly concerned. The agents were aware of Dennison's information concerning Spring's admission of involvement in a Colorado homicide, and did ask a few questions relating to that incident. Patterson asked Spring about a prior incident in which Spring shot an aunt as a juvenile. He then asked Spring if he had ever shot anyone else. Spring answered: "I shot another guy once." Patterson then asked Spring if he had been in Colorado and Spring replied, "No." Patterson asked if it were true that Spring had killed a Don Walker west of Denver and thrown the body in a snowbank. Spring said, "No."

7. The Court finds that this questioning was conducted while the Defendant was in lawful custody, pursuant to a valid arrest; that Spring had been properly advised of his rights and was aware of his right to remain silent, to have Counsel present during interrogation, to stop the interrogation at any time; and that his responses to the interrogation were made freely, voluntarily and intelligently; that there was no element of duress or coercion used to induce Spring's statements on March 30, 1979.

8. Though it is true that Patterson and Sadowski did not specifically advise Spring that a part of their interrogation would include questions about a Colorado homicide, the questions themselves suggested the topic of inquiry. The questions dealt with "shooting anyone" and specifically killing a man named Walker and throwing his body in a snowbank in Colorado. The questions were not designed to gather information relating to a subject that was not readily evident or apparent to Spring. Spring had been advised of his right to remain silent, his right to stop answering questions, and to have an Attorney present during interrogation. He did not elect to exercise his right to remain silent or to refuse to answer questions relating to the homicide, nor did he request Counsel during interrogation.

9. The Court concludes that the statements made to Patterson and Sadowski on March 30, 1979, should not be suppressed, and may be admitted in evidence.

10. The .22 cal. pistol was lawfully seized in a lawful search pursuant to a valid and lawful arrest and should not be suppressed. Exhibit F is deemed admissible in evidence.

11. On May 26, 1979, Detective Curtis of the Moffat County Sheriff's Department and Agent Leo Konkel of the Colorado Bureau of Investigation interviewed Spring at the Jackson County Jail in Kansas City, Missouri. These Officers again advised Spring of his "Miranda" rights and Spring once again executed a written acknowledgement and waiver form. The Officers identified themselves, and told Spring they wanted to question him about the Walker homicide. Spring told the Officers he wanted to get it off his chest. The interview lasted approximately 1-1/2 hours, and

during that time Spring talked freely to the Officers, did not elect to refuse to answer any questions, and never equested Counsel during the interview, although he was aware of his right to remain silent, to stop the interrogation, and to have Counsel present. There is no evidence that the interrogation, conducted in the "day room" of the jail was conducted in a coercive manner or that any threats or promises were made to Spring to induce his participation in the interview. After the interview was completed, Spring read and edited a written statement summarizing the interview prepared by Konkel, and signed the written statement. The Court finds that the statement given by Spring on May 26, 1979, was made freely, voluntarily, and intelligently, after his being properly and fully advised of his rights, and that the statement should not be suppressed, but should be admitted in evidence.

12. Spring was next interviewed by Agent Patterson at the Jackson County Jail on July 13, 1979, after Spring had been found guilty of the firearms violations. Patterson's primary purpose of conducting this interview was to obtain additional information concerning Spring's knowledge of an additional cache of firearms and explosives. Agents Patterson and Wactor conducted this interview. They met Spring, Patterson identified the agents, and Spring laughingly said, "I know who you guys are." Spring was re-advised pursuant to the "Miranda" requirements using the standard ATF advisement and waiver form. Upon being advised on this occasion, Spring said, "I understand my rights but I won't sign anything without a Lawyer."

13. Patterson and Wactor got up and started to leave. As the agents were exiting the day room, Spring said, "I won't sign any forms without a Lawyer, but I'll talk to you."

The agents then sat back down and continued their discussion with Spring. During this interrogation, Spring admitted being in Colorado in 1979. He was asked about firearms, and he was specifically asked where he got the .22 cal. pistol the agents had seized (Exhibit F). Spring said, "That's Walker's gun."

Asked if he took the gun off Walker's body, Spring said, "I'd rather not talk about that." Asked if he shot Walker, Spring said, "I'd rather not talk about that." Asked if Wagner had shot Walker, Spring said, "I'd rather not talk about that."

Spring did say that he, Wagner and Walker had been riding around together, and that he had gotten the gun from Walker before Walker went into the ravine.

Patterson asked, "Is it safe to assume that you, Wagner and Walker went out together and that only you and Wagner came back alive?" Spring replied, "Yeah, you could say that."

14. The Defendant urges that the statements made during the July 13th interview should be suppressed because of the continued interrogation after a request for Counsel. From the evidence presented, however, the request for Counsel was not for advise during interrogation, but for the purpose of advising him if he were to be asked to sign any "forms." Spring indicated that he did understand his right to remain silent, but that he did not want to exercise that right. He also was aware of his right to Counsel, but elected not to request Counsel unless "forms" were to be signed. He was advised that any statement he made might be used against him, and indicated that he understood that warning as well as the other "Miranda" warnings.

Spring did understand that he had the right not to answer questions, and exercised that right with respect to several specific questions.

Spring further urges that again he was not advised prior to the interview that he would be questioned about the Walker homicide. However, once, again, the questions were not disguised ruse questions designed to trick an unwary person into admitting involvement in a crime of which he was totally unaware. By July 13, 1979, Spring had already told Curtis and Konkel about his involvement with Wagner in the shooting of Walker in the May 26th interview. In addition, by that time a warrant had been issued by this Court upon an Information charging Spring with Walker's murder. The arrest warrant issued on May 29th, 1979, and a hold had been placed on Spring in connection with the Moffat County murder charge before the July 13th interview.

15. The Court concludes that Spring made the July 13 statements to Patterson and Wacter after being fully and adequately advised of his "Miranda" rights, and that he knowingly and intelligently waived his right to remain silent or to have an Attorney present during questioning. The statements were made without inducement by coercion or threat. No promises were made by the agents to induce his statements. The statements of July 13, 1979, should not be suppressed, and should be admitted in evidence.

16. The Defendant contends as a matter of law that Count V of the Amended Information must be dismissed because the conviction therein alleged occurred after the date of commission of the principal offense of Murder as contained in Count I of the Information. The alleged date of

the murder is "on or about the 1st day of February, 1979..." The date of the conviction relied upon in Count V of the Information to support penalty enhancement under C.R.S. 1973, 16-13-101, is July 5, 1979.

17. C.R.S. 16-13-101 provides "Every person convicted... who, *within ten years of the date of the commission of said offense, has been twice previously convicted* ... " (emphasis added) shall be adjudged an habitual criminal. The Statute on its face would seem to require that the previous convictions relied upon must antedate the date of commission of the primary offense rather than the date of trial or conviction of the primary offense. This construction is consistent with the construction of similar Statutes in other States. See Annot. 24 ALR2d 1247, 1249. Such construction is also consistent with the general rule that criminal Statutes in derogation of the common law must be strictly construed, and doubtful questions of construction must be resolved in favor of the accused. The Court therefore concludes that Count V must be dismissed for failure to properly charge a criminal offense. Further, the dismissal of Count V will render Count IV of the Complaint Information invalid to state an offense and Count IV will, by dismissal of Count V, be mere surplusage. Count IV should also be dismissed.

For the foregoing reasons and based upon the Findings and Conclusions stated above,

IT IS ORDERED that the Defendant's Motion to Suppress evidence and statements is DENIED.

IT IS FURTHER ORDERED that the Defendant's Motion to dismiss Count V of the Information is GRANTED.

IT IS FURTHER ORDERED that Count IV of the Information is DISMISSED and STRICKEN as surplusage.

DATED this 4th day of April, 1980, at Craig, Colorado.

BY THE COURT:

Claus J. Hume, District Judge

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COLORADO COURT OF APPEALS

No. 80CA1081

THE PEOPLE OF THE
STATE OF COLORADO,

Plaintiff-Appellee,

vs.

JOHN LEROY SPRING,

Defendant-Appellant.

Appeal from the District Court of Moffat County

Honorable Claus J. Hume, Judge

DIVISION III

Opinion by JUDGE TURSI

Kirshbaum, J. concurs
Van Cise, J. dissents

JUDGMENT
REVERSED AND
CAUSE
REMANDED WITH
DIRECTIONS

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Appealing his conviction for first degree murder in the death of Donald Walker, defendant, John Spring, contends the trial court erred in denying his motion to suppress three separate statements made while in custody for an unrelated offense. We find error in the suppression rulings, and accordingly, we reverse and remand for new trial.

I

Federal Alcohol, Tobacco & Firearms (ATF) agents in Kansas City, Missouri, learned from an informant that Spring was selling stolen weapons and that he had been involved in the early February shooting of Donald Walker near Craig, Colorado. At ATF's request, this informant contacted Spring, and on March 22, 1979, recorded a phone conversation which arguably implicated Spring in Walker's death. Spring ultimately was arrested in Kansas City on March 30, 1979, by undercover ATF agents to whom he was selling stolen weapons.

Spring signed a formal waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) with reference to the charges for which he was in ATF's custody, and the arresting agents questioned him about weapons transactions. Later in the interview, however, these same agents questioned him about the Colorado shooting. At no time was Spring informed that the agents already suspected him of murder in Walker's death, and he was not readvised of his rights when questioned in that regard.

Waivers of constitutional rights not only must be voluntary but must also be knowing, intelligent acts done with an awareness of the relevant circumstances and likely consequences. *Brady v. U.S.*, 397 U.S. 742, 90 S.Ct. 1463, 25

L.Ed.2d 747 (1970); *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

An advisement of the privilege against self-incrimination and of right to counsel is sufficient if the accused fully knows the general nature of the crime involved. *People v. Weaver*, 179 Colo. 331, 500 P.2d 980 (1972). If knowledge of the crime is withheld, a suspect cannot intelligently make the decision as to whether he wants counsel. *Schenck v. Ellsworth*, 293 F. Supp. 26 (D. Montana 1968). Therefore, Spring's waiver of his rights to silence and the presence of counsel with regard to the weapons-related conduct did not operate as a waiver of those rights with regard to unrelated criminal conduct which had occurred some two months previously in Colorado. *See U.S. v. McCrary*, 643 F.2d 323 (5th Cir. 1981).

The agents had a duty to inform Spring that he was a suspect, or to readvise him of his *Miranda* rights, before questioning him about the murder. *See McClain v. People*, 178 Colo 103, 495 P.2d 542 (1972). Because the agents failed to so advise, any waiver of rights in regard to questions designed to elicit information about Walker's death was not given knowingly or intelligently. *U.S. v. McCrary, supra*. Spring's responses are accordingly rendered inadmissible, and his conviction must be reversed.

II

ATF forwarded the results of its March interrogation to the Colorado Bureau of Investigation, and CBI agents traveled to Missouri and obtained a written statement from Spring on May 26, 1979. The record is silent as to what other information was in CBI's possession to link Spring to the Walker homicide.

Defendant argues that, if the March 30 statement to

the ATF is inadmissible, the statement obtained by the CBI on May 26 is "fruit of the poisonous tree," and must be suppressed. *See Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

If the May 26 statement was obtained by means significantly distinguishable from that used in obtaining the March 30 statement so as to be purged of the primary taint arising from the March 30 questioning, the statement would be admissible. *People v. Founds*, 621 P.2d 325 (Colo. 1981). It is the People's burden to establish that the statement was not the product of Spring's prior incriminating statements. *People v. Lowe*, 200 Colo. 470, 616 P.2d 118 (Colo. 1980). This burden was not met.

III

The trial court also erred in admitting the statements Spring made to ATF agents on July 13, 1979. The agents came to Spring for the stated purpose of "tying up loose ends" in the weapons case, to which by then he had pled guilty. Spring orally waived his *Miranda* rights and spoke freely with the agents. However, when the agents began asking about the homicide, Spring anwswered, "I'd rather not talk about that." The agents shifted the interview to other topics, but returned again to the homicide. This process was repeated until the agents obtained an incriminating response.

A waiver of *Miranda* rights must be established by clear and convincing evidence based on all circumstances, including details of the interrogation and defendant's conduct. While Spring waived his rights to silence and counsel as to the weapons charges, he did invoke his right to silence as to the homicide. *People v. Lowe, supra*. Officers who meet

with a refusal to make any statement during an attempted in-custody interrogation are not permitted periodically to repeat the procedure until the accused finally makes a statement. *Dyett v. People*, 177 Colo. 370, 494 P.2d 94 (1972). Further, we hold that Spring was entitled to renewed *Miranda* warnings when the agents began to question him on crimes unrelated to the stated purpose for their inquiry. *U.S. v. McCrary, supra; McClain v. People, supra*.

The judgment of conviction is reversed and the cause is remanded for new trial, with directions that if the People seek the introduction of the May 26 statement on retrial, the trial court must first resolve the issue of attenuation from the tainted statement of March 30.

JUDGE KIRSHBAUM concurs

JUDGE VAN CISE dissents.

JUDGE VAN CISE dissenting:

I respectfully dissent. In my opinion, the statements made by the defendant on each of the three occasions were voluntary and he was adequately advised each time.

As for the first statement made on March 30 to ATF agents, subsequent to the defendant's arrest that day for illegal possession and sale of stolen firearms, defendant was twice advised of his rights before questioning. He indicated that he understood his rights, signed a written acknowledgment and waiver, and, as found by the court, responded "freely, voluntarily, and intelligently" to the questions asked.

The defendant's arrest related to his possession and sale of certain stolen firearms, one of which he had obtained

from the murder victim, Walker. Another possible, related charge, was the violation of the federal law prohibiting prior convicted felons from possessing firearms. Therefore, the defendant's prior criminal record and use of guns, as well as the source of the stolen guns found in the defendant's possession that day, were clearly reasonable, foreseeable subject matters of questioning.

In order to validate a waiver by a defendant of his *Miranda* rights as knowingly, intelligently, and voluntarily made, the defendant, after the *Miranda* warning, need not be informed of specific charges which may be brought against him. *People v. Herrera*, 633 P.2d 1091 (Colo. App. 1981), citing *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974) and *People v. Weaver*, 179 Colo. 331, 500 P.2d 980 (1972).

Here, the defendant was fully aware that his activities surrounding possession and sale of stolen firearms were the basis for his arrest and the agents' investigation. Questions regarding the source and the use of the .22 pistol found on him that day were foreseeable, and the defendant's *Miranda* waiver was valid and proper. Thus, the trial court properly refused to suppress the March 30 statement in which the defendant denied his presence and involvement in the Walker shooting.

The two subsequent statements were made almost two months and three and one-half months, respectively, *after* the first statement. The second statement, on May 26, was made under unique circumstances to Colorado law enforcement officials Konkel and Curtis, who had travelled to the Kansas City jail to interview the defendant. Kansas City jail personnel told the defendant that Colorado authorities

were there to see him and asked him if he wished to speak with them. The defendant agreed to the visit, told Curtis he wanted to get it off his chest and that he wanted to talk with them. The interview-visit was conducted in the jail day room, containing some desks and vending machines. The defendant was fully advised of his *Miranda* rights and, again, signed an acknowledgment and waiver form. The defendant then reviewed a summary of his oral statement, written by Konkel, corrected the statement, initialed the corrections and signed it.

The third statement, on July 13, was made to federal agents after defendant had been convicted of the firearms violations. He was readvised, at which point he said, "I understand my rights but I won't sign anything without my lawyer." The agents got up and started to leave. The defendant then told the agents, "I won't sign any forms without a lawyer, but I'll talk to you." The defendant then told the officers how he obtained the stolen .22 pistol and about the Walker killing.

The trial court correctly found that all of these statements were voluntary, and were made after a knowing and intelligent waiver. There was no error in admitting them.

Since the other contentions for reversal are without merit, the conviction should be affirmed.

SUPREME COURT, STATE OF COLORADO

December 2, 1985

CASE NO. 83SC145

THE PEOPLE OF THE STATE OF COLORADO,
Petitioner,

vs.

JOHN LEROY SPRING, Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

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JUSTICE LOHR delivered the Opinion of the Court.
JUSTICE ERICKSON dissents in part and
concurs in part.
JUSTICE ROVIRA joins in the dissent and concurrence.
JUSTICE KIRSHBAUM does not participate.

In *People v. Spring*, 671 P.2d 965 (Colo. App. 1983), the Colorado Court of Appeals reversed the conviction of defendant John Leroy Spring for first degree murder because it concluded that the trial court erred in denying the defendant's motion to suppress certain statements made by him while in custody during questioning by police officers. We granted the People's petition for certiorari to review this holding. We also granted that part of the defendant's petition for certiorari in which he contends that the trial court committed reversible error by improperly limiting his right to present evidence in his own behalf through defense witnesses, an issue not reached by the court of appeals.[1]

We agree with the court of appeals that the district court erred in denying the defendant's motion to suppress two of the three statements in question, and that a new trial is required as a result, although we do not agree fully with the reasoning of the court of appeals. We also affirm the court of appeals' holding that it was not established whether the third statement was the product of an illegally obtained statement and, therefore, that further proceedings are necessary to resolve the issue of attenuation if the People seek to introduce that statement into evidence at a retrial of Spring. Because certain errors alleged by Spring in his petition for certiorari are likely to arise again upon retrial, we address them in this opinion and conclude that the trial court was unduly restrictive in refusing to admit certain testimony offered by the defendant.

I.

Defendant John Leroy Spring was charged in Moffat County District Court with the first degree murder of Donald Walker.[2] Evidence presented at trial established

that Walker was shot to death during a nighttime elk hunt in early February of 1979 while in the company of Spring and another man, Donald Wagner. The three men had driven to a hunting site near Craig, Colorado. Walker was asked by one of the other men to walk ahead and search a ravine next to the road for elk. Wagner then asked Spring to shine a flashlight in the direction of Walker, whereupon Wagner fired a rifle shot that hit Walker in the head and dropped him to the ground. Wagner then approached the victim and fired a second shot, which resulted in Walker's death. Spring's defense at trial was that he had no knowledge that Wagner was going to shoot and kill Walker and that he assisted Wagner in burying Walker's body in the snow and in further concealing the murder because he was afraid of Wagner. Spring was convicted by a jury of first degree murder and sentenced to life imprisonment, and he appealed.

The court of appeals reversed the conviction, holding that statements made to officers by Spring on March 30, 1979, and July 13, 1979, while he was in custody, were taken in violation of his constitutional rights and that the People had failed to establish that a third statement, made by Spring on May 26, 1979, was not a fruit of the March 30 statement. Specifically, the court of appeals held that because Spring was not informed prior to the March 30 and July 13 interviews that the officers were going to question him about Walker's death, Spring's waivers of his right to remain silent and his right to counsel were not intelligent and knowing. With regard to the July 13 statement, the court of appeals also held that the officers improperly continued to question Spring about Walker's death after Spring told them that he did not want to talk about the subject. For these reasons, the court of appeals concluded

that the trial court committed reversible error when it refused to grant Spring's motion to suppress the three statements. *People v. Spring*, 671 P.2d at 966-67. We granted the People's petition for certiorari to review these suppression holdings.

The defendant also filed a petition for certiorari, arguing that the trial court committed a variety of errors during his trial in addition to the failure to suppress the challenged statements. We decided to review Spring's assertion that the trial court improperly limited his right to present evidence on his own behalf through defense witnesses. We begin with an examination of the suppression issues.

II.

Spring made three statements to law enforcement officers while in custody, each one after an advisement of rights and without an attorney present. Two of those statements were admitted into evidence at trial. The statements, and the circumstances surrounding their making, will be described in part B below. A review of the general principles governing the admissibility of statements made by a person in custody will be useful before considering the statements at issue.

A.

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates that the defendant was warned adequately of his privilege against self-incrimination and his right to counsel and thereafter voluntarily, knowingly and intelligently waived those

rights. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 467-76, 479 (1966); *People v. Lee*, 630 P.2d 583, 588 (Colo. 1981). The reason for the warning requirement is that, without such a safeguard, the compelling pressures inherent in police custody "work to undermine the individual's will to resist and to compel him to speak [where] he would not otherwise do so freely." *People v. Lee*, 630 P.2d at 588, *quoting Miranda v. Arizona*, 384 U.S. at 467. A consideration separate from the requirement of an advisement of rights and a valid waiver of those rights is that a statement obtained from a defendant is admissible only if made voluntarily. *Jackson v. Denno*, 378 U.S. 368 (1964); *People v. Thorpe*, 641 P.2d 935, 941 (Colo. 1982). A defendant's due process rights are violated if his conviction is founded, in whole or in part, upon an involuntary statement. *People v. Connelly*, 702 P.2d 722, 728 (Colo. 1985). Thus, when reviewing a motion to suppress a statement, and after determining that the statement was preceded by a proper *Miranda* advisement, a court is required to address both the effectiveness of the waiver of *Miranda* rights and the voluntariness of the statement itself. *People v. Pierson*, 670 P.2d 770, 775-76 (Colo. 1983); *People v. Fish*, 660 P. 2d 505, 508 (Colo. 1983).[3]

First, the trial court must determine whether the defendant voluntarily, knowingly and intelligently waived his right to remain silent and his right to have counsel present. *People v. Pierson*, 670 P2d at 775; *People v. Fish*, 660 P.2d at 508. "A waiver is valid if it is a knowing and intelligent relinquishment of a known right under the totality of the circumstances which in turn is determined by 'the particular facts and circumstances surrounding [that] case, including the background, experience, and conduct of the accused.'" *People v. Pierson*, 670 P.2d at 775, *quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The burden of

proof is on the prosecution to prove by clear and convincing evidence that the defendant waived his constitutional rights. *People v. Fish*, 660 P.2d at 508. *See Miranda v. Arizona*, 384 U.S. at 475 (a "heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived" his rights). A valid waiver will not be presumed simply because a statement has been obtained from the defendant. *Miranda v. Arizona*, 384 U.S. at 475; *People v. Pierson*, 670 P.2d at 776. "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda v. Arizona*, 384 U.S. at 476.

If the court determines that the defendant validly waived his constitutional rights, the court must then decide whether the defendant's statement was voluntarily made. *People v. Pierson*, 670 P.2d at 776; *People v. Fish*, 660 P.2d at 508. The burden of proof is on the prosecution to establish by a preponderance of the evidence, considering the totality of the circumstances, that the statement was voluntary. *People v. Cummings*, 706 P.2d 766, 769 (Colo. 1985); *People v. Fish*, 660 P.2d at 508. Statements may not be admitted if they were obtained through promises, threats, violence, or any other improper influence. *People v. Cummings*, 706 P.2d at 769.

Findings of fact made by a trial court as part of its determination concerning the validity of a waiver of rights and the voluntariness of a statement will be upheld on appeal if supported by adequate evidence in the record. *People v. Cummings*, 706 P.2d at 769; *People v. Pierson*, 670 P.2d at 776; *People v. Freeman*, 668 P.2d 1371, 1378 (Colo. 1983); *People v. Fish*, 660 P.2d at 509, 510. However, the

appellate court may not ignore uncontradicted and credible evidence in the record that is contrary to the trial court's decision. *People v. Freeman*, 668 P.2d at 1378.

With these general principles in mind, we turn next to a description and analysis of the circumstances surrounding the making of the statements by Spring.

B.

Prior to trial, Spring filed a motion to suppress the relevant statements. After a hearing on March 17, 1980, the trial court issued a written order, which included findings of fact, denying the motion to suppress. The relevant facts concerning each statement that follow come from the trial court's findings of fact, supplemented where necessary by testimony given at the suppression hearing and by other facts in the record.

1. *Statement of March 30, 1979.*

Spring was arrested on March 30, 1979, in Kansas City, Missouri, by agents of the federal Bureau of Alcohol, Tobacco and Firearms (ATF) on charges of interstate transportation of stolen firearms and other related offenses. Acting upon information provided by an informant, George Dennison, the ATF agents had set up an undercover operation to purchase firearms from Spring, and Spring was arrested during this transaction.

Prior to Spring's arrest, the ATF agents also were told by Dennison that Spring had admitted that he and Wagner had killed Walker. At the time the ATF agents received the information from informant Dennison, Walker's body had not been discovered and no report had been made to the police about his disappearance. On March 22, 1979, a week

and specifically killing a man named Walker and throwing his body in a snowbank in Colorado. The questions were not designed to gather information relating to a subject that was not readily evident or apparent to Spring. Spring had been advised to his right to remain silent, his right to stop answering questions, and to have an Attorney present during interrogation. He did not elect to exercise his right to remain silent or to refuse to answer questions relating to the homicide, nor did he request Counsel during interrogation.

9. The Court concludes that the statements made to Patterson and Sadowski on March 30, 1979, should not be suppressed, and may be admitted in evidence.

However, the March 30 statement was never introduced at trial. During trial, the trial court granted the defendant's motion *in limine*, ruling that Spring's statement that he "shot another guy once" was irrelevant and could not be admitted into evidence because the context of the discussion indicated that it did not relate to the Walker homicide. Although the court ruled that the remainder of the statement, including Spring's denial that he killed Walker, was admissible, neither the prosecution nor Spring chose to offer the statement into evidence.

The court of appeals held that it was error not to suppress the statement of March 30. The court first noted that at the time Spring's waiver was obtained, Spring had not been informed by the agents that they were going to question him about the Walker homicide. *People v. Spring*, 671 P.2d at 966. The court of appeals then stated that a knowing and intelligent waiver of *Miranda* rights cannot occur if the defendant is not informed at the time of waiver as to the nature of the crime about which he is going to be questioned, and held:

> The agents had a duty to inform Spring that he was a suspect, or to readvise him of his *Miranda* rights, before questioning him about the murder ... Because the agents failed to so advise, any waiver of rights in regard to questions designed to elicit information about Walker's death was not given knowingly or intelligently.

Id. at 966-67 (citations omitted). The court of appeals concluded that Spring's statement is "accordingly rendered inadmissible" and that his conviction must be reversed, *id.* at 967, apparently unaware that this statement had not been admitted into evidence at trial.

Although the failure to suppress the March 30 statement cannot be considered reversible error because the statement did not become part of the evidence at trial, whether the statement was obtained in violation of Spring's constitutional rights remains a relevant question. If the statement was illegally obtained, the prosecution must establish that any subsequent statement otherwise properly obtained from Spring and admitted into evidence was not the product of the tainted statement. *Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. Lee*, 630 P.2d 583, 590 (Colo. 1981); *People v. Lowe*, 200 Colo. 470, 475-76, 616 P.2d 118, 123 (1980).

Although we agree that the March 30 statement should have been suppressed, we conclude that the court of appeals adopted and applied an improper legal standard to resolve the admissibility of the statement. As outlined above, the validity of Spring's waiver of constitutional rights must be determined upon an examination of the totality of the circumstances surrounding the making of the statement to determine if the waiver was voluntary, knowing and intelligent. *People v. Pierson*, 670 P.2d at 775; *People v.*

and specifically killing a man named Walker and throwing his body in a snowbank in Colorado. The questions were not designed to gather information relating to a subject that was not readily evident or apparent to Spring. Spring had been advised to his right to remain silent, his right to stop answering questions, and to have an Attorney present during interrogation. He did not elect to exercise his right to remain silent or to refuse to answer questions relating to the homicide, nor did he request Counsel during interrogation.

9. The Court concludes that the statements made to Patterson and Sadowski on March 30, 1979, should not be suppressed, and may be admitted in evidence.

However, the March 30 statement was never introduced at trial. During trial, the trial court granted the defendant's motion *in limine*, ruling that Spring's statement that he "shot another guy once" was irrelevant and could not be admitted into evidence because the context of the discussion indicated that it did not relate to the Walker homicide. Although the court ruled that the remainder of the statement, including Spring's denial that he killed Walker, was admissible, neither the prosecution nor Spring chose to offer the statement into evidence.

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Fish, 660 P.2d at 508. No one factor is always determinative in that analysis. Whether, and to what extent, a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is simply one factor in the court's evaluation of the total circumstances, although it may be a major or even a determinative factor in some situations. *Carter v. Garrison*, 656 F2d 68, 70 (4th Cir. 1981) (per curiam); *United States v. McCrary*, 643 F2d 323, 328-29 (5th Cir. 1981); *United States ex rel. Henne v. Fike*, 563 F2d 809, 813-14 (7th Cir. 1977); *Collins v. Brierly*, 492 F.2d 735, 738-40 (3rd Cir.) (en banc) (*and see* at 741-43, Adams, J., dissenting), *cert. denied*, 419 U.S. 877 (1974); *State v. Carter*, 250 S.E.2d 263, 269 (N.C. 1979); *State v. Goff*, 289 S.E.2d 473, 476-77, 477 n.8 (W. Va. 1982).

We recognize that

> [i]t is difficult to discern how a waiver of these rights could be knowing, intelligent and voluntary where the suspect is totally unaware of the offense upon which the questioning is based.
>
> A valid waiver of constitutional rights does not occur in a vacuum. [A] waiver of the right to counsel and right to remain silent occurs in response to a particular set of facts involving a particular offense. The *Miranda* warnings are given not solely to make the suspect aware of the privilege, but also of the consequences of foregoing the privilege.

United States v. McCrary, 643 F.2d at 328-29 (footnotes omitted). It seems likely that a suspect's decision whether to consult with an attorney before answering questions will often be influenced by the seriousness of the matter underlying the interrogation. "It is a far different thing to forego a lawyer where a traffic offense is involved than to waive counsel where first degree murder is at stake." *Commonwealth v. Collins*, 259 A.2d 160, 163 (Pa. 1969) (plurality opinion).

One factor often considered crucial to a court's determination as to the validity of a waiver when faced with facts similar to those presented here is the extent of the suspect's knowledge concerning the likely subjects and scope of the prospective questioning. Thus it is important to determine whether the questions were related to crimes or general subject matter about which the suspect anticipated interrogation, or whether the police led the suspect to believe that he would be questioned about one crime but then interrogated him about a totally unrelated offense. *See, e.g., Carter v. Garrison*, 656 F.2d at 70; *United States v. McCrary*, 643 F.2d at 328-29. In that connection, in the past we have upheld specific waivers because at the time of interrogation the defendants knew "the general nature of the crime involved." The fact that the defendants in those cases had not been informed before interrogation as to the specific crimes with which they were later charged did not render their waivers constitutionally infirm. *People v. Casey*, 185 Colo. 58, 61, 521 P.2d 1250, 1252 (1974); *People v. Weaver*, 179 Colo. 331, 335, 500 P.2d 980, 982-83 (1972). *See also Duncan v. People*, 178 Colo. 314, 318, 497 P.2d 1029, 1031 (1972); *People v. Herrera*, 633 P.2d 1091, 1094 (Colo. App.), *cert. denied* (Colo. 1981); *Commonwealth v. Dixon*, 379 A.2d 553, 556 (Pa. 1977); *State v. Goff*, 289 S.E. 2d at 477 n.8.

The federal district court in Montana has adopted an absolute rule that a waiver of *Miranda* rights can never be intelligent, knowing and voluntary when the suspect is not "told of the crime he is suspected of having committed" before questioning begins. *Schenck v. Ellsworth*, 293 F.

Supp. 26, 29 (D. Mont. 1968). The Pennsylvania Supreme Court adopted a less demanding, but still absolute, rule that "a valid waiver of *Miranda* rights requires that the suspect have an awareness of the general nature of the transaction giving rise to the investigation." *Commonwealth v. Dixon*, 379 A.2d at 556 (footnote omitted). We believe it to be more consistent with standards governing the validity of a waiver to consider the extent of the suspect's understanding of the subject matter and the source of that understanding, simply as factors in the totality of circumstances surrounding the making of a statement. We decline to elevate those considerations into an absolute rule that renders any waiver automatically invalid when the interrogated suspect has not been informed of the subject matter of the questioning prior to its commencement.

Obviously, a most serious obstacle to the establishment of a voluntary, knowing and intelligent waiver of *Miranda* rights will be presented when the suspect is *totally* unaware of the subject matter of the interrogation at the time he agrees to waive his rights and answer questions. What must be remembered is that an awareness may come from many sources, not only from a direct and explicit statement by the interrogating officers, and that the awareness can vary from a specific knowledge of the crime upon which the questioning will focus to a general understanding of the subject matter in which the interrogators are interested. Thus, an examination of the totality of the circumstances is proper and necessary to determine, among other things, the extent of the suspect's awareness of the subject matter of the investigation and the impact of this awareness, or lack of awareness, on the suspect's decision to waive his constitutional rights.

Here, the absence of an advisement to Spring that he would be questioned about the Colorado homicide, and the lack of any basis to conclude that at the time of the execution of the waiver, he reasonably could have expected that the interrogation would extend to that subject, *are* determinative factors in undermining the validity of the waiver. The ATF agents did not advise Spring that a part of their interrogation would include questions about the Colorado homicide prior to Spring's decision to waive his constitutional rights and to answer questions. Spring had no reason to suspect that the federal agents who had just arrested him in Kansas City during a firearms transaction that allegedly violated federal law would question him about a murder that occurred in Colorado, a crime not only in a distant jurisdiction but also outside of the normal purview of the federal Bureau of Alcohol, Tobacco and Firearms and totally unrelated to the transaction that gave rise to the arrest and interrogation. Moreover, the federal crime that occasioned the interrogation, and about which Spring was cognizant when he signed the written waiver and agreed to answer questions, represented a relatively less serious matter than first degree murder. Although the background and experience of the suspect is a further relevant consideration in determining the validity of any waiver, *People v. Pierson*, 670 P.2d at 775, the record offers little with regard to Spring's intelligence or acquaintance with the criminal justice process, other than the fact that Spring had a criminal record. Given these facts, it cannot be said that the prosecution carried its burden of proving by clear and convincing evidence that Spring made a voluntary, knowing and intelligent decision to forego counsel and to answer questions concerning the murder.[5].

The district court concluded that the "questions them-

selves suggested the topic of inquiry." Certainly, nothing about the questions concerning the federal firearms crimes or about Spring's past criminal record could have suggested to Spring that the topic of inquiry would soon be a Colorado homicide. According to the district court, it is only by the exact questions at issue—whether Spring had killed anyone else, whether he had ever been in Colorado and whether he had shot a man named Walker west of Denver and thrown his body in a snowbank—that Spring became acquainted with the subject of the inquiry. But, the mere fact that a suspect answers questions, without more, does not establish that a valid waiver has occurred. *Miranda v. Arizona*, 384 U.S. at 475. These questions were asked long after Spring had signed the written waiver and agreed to talk to the officers. In the present context, we agree with the Pennsylvania Supreme Court that

> "[o]nce an accused has signed the waiver stating that he is willing to give a statement, it is no longer efficacious that he then be told what he is being questioned about. *The compulsive force of the unintelligent waiver has already had its effect.*" By this we do not mean to establish a *per se* rule that no post-waiver action taken by police to inform the defendant of the transaction involved can ever be effective ... ; we do hold, however, that a valid waiver will not be found simply because a suspect lacked the presence of mind to halt the interrogation and assert his constitutional rights the moment he was asked a question that revealed the nature of the criminal episode under investigation. Nor is our view in the present case altered by the fact that the police waiver form signed by [the accused] expressly advised the accused that she had the right to call a halt to the questioning. While inclusion of this provision is to be commended, it does little by itself to mitigate the psychological *fait accompli* of the written waiver.

Commonwealth v. Dixon, 379 A.2d at 557 (footnote and

citation omitted), *quoting Commonwealth v. Collins*, 259 A.2d 160, 163-64 (Pa. 1969) (plurality opinion) (emphasis added in *Dixon*).

For these reasons, we conclude that the People did not meet their heavy burden of proving that Spring's answers to questions relevant to the Colorado homicide were made after a voluntary, knowing and intelligent waiver of rights. We agree with the court of appeals that the answers were illegaly obtained and that the district court erred by refusing to grant the defendant's motion to suppress the statement of March 30.

2. Statement of May 26, 1979.

While in jail in Kansas City on May 26, 1979, Spring gave a statement concerning the homicide to Detective Curtis of the Moffat County Sheriff's Department and Agent Konkel of the Colorado Bureau of Investigation. The officers gave Spring a *Miranda* advisement similar in its essentials to the one given by the ATF agents on March 30 and described above, and Spring again executed a written acknowledgement and waiver of his rights. In answer to the officers' questions, Spring acknowledged that he accompanied Wagner and Walker on the elk hunt, that either he or Wagner suggested that Walker go into the ravine to find an elk, that Wagner told Spring to shine his flashlight in the direction of Walker, that Spring was holding the flashlight when Wagner shot Walker, that Spring or Wagner emptied the victim's pockets, that Spring assisted Wagner in dragging Wagner's body five or ten feet from where he was killed, and that Spring participated with Wagner in lying about the whereabouts of Walker afterwards. And, according to Detective Curtis, Spring told the officers that

he knew or had an idea that something might happen to Walker that night. Spring did not tell Curtis and Konkel that he had no knowledge that Wagner was going to shoot Walker that evening or that his own actions were compelled by his fear of Wagner, as Spring offered in his defense at trial. After the questioning was completed, Spring read, edited and signed a written statement, prepared by Konkel and summarizing the interview.

As part of his motions to suppress, Spring argued that the May 26 statement, otherwise the product of a valid advisement and waiver, should be suppressed as the direct fruit of the illegally obtained statement of March 30. Because the district court concluded that the statement of March 30 was not illegally obtained, it did not consider or decide whether the May 26 statement was the fruit of the March 30 statement. The May 26 statement subsequently was received in evidence at trial, and Spring later echoed, supplemented and explained that statement in his own testimony.

Because of its ruling that the statement of March 30 *was* illegally obtained, the court of appeals held that the People had the burden to prove that the statement obtained from Spring by the Colorado officers on May 26 was not the "fruit of the poisonous tree" of the statement of March 30. *See People v. Lowe*, 200 Colo. at 475-76, 616 P.2d at 123. This burden had not been met. *People v. Spring*, 671 P.2d at 967. If the People sought the admission of the May 26 statement on retrial, "the trial court must first resolve the issue of attenuation from the tainted statement of March 30." *Id.*

The People argue that if we agree with the court of appeals that the statement of March 30 was illegally

obtained, as we have, then we should decide, on the basis of the record made at the suppression hearing, whether the May 26 statement was the direct fruit of the March 30 statement. We conclude instead that the trial court must resolve the attenuation issue by the application of the appropriate standards to the evidence, *see People v. Briggs*, 83SC134, slip op. at 6-7 (Colo. November 18, 1985), with leave to hold a supplemental hearing for the presentation of further evidence if deemed necessary by the district court.[6]

3. *Statement of July 13, 1979.*

After Spring had been found guilty of the federal firearms violations, ATF agents Patterson and Wactor interviewed Spring on July 13, 1979, in the Jackson County Jail. The trial court found that the primary purpose for conducting this interview, a purpose apparently made known to Spring at the outset, was to obtain information from him concerning the whereabouts of additional firearms and explosives. When the interview began, Spring was not told that he would be questioned about the Walker homicide.

Spring again was advised of his rights in an advisement identical to the one he received before his interrogation on March 30. Spring acknowledged that he understood his rights, but declined to sign any form without consulting an attorney. The agents got up to leave, whereupon Spring stated that he would talk to the agents without an attorney being present; howver, he would not sign the written acknowledgement and waiver form. On that basis, the agents resumed the interview.

The interrogation apparently began with a wide-ranging discussion of the whereabouts of various firearms and

explosives of which Spring might be aware, along with related subjects. As part of this discussion, Spring was asked where he had obtained a .22 caliber pistol that the agents has seized from him at the time of his arrest. Spring replied that it had been Walker's gun. Asked if he took the gun off Walker's body, Spring said, "I'd rather not talk about that." Later, the agents asked Spring if he had shot Walker and, subsequently, if Wagner had shot Walker. To both questions, Spring again replied, "I'd rather not talk about that." At some point in the interview, Spring was willing to state that he had been in Colorado in 1979 and that he, Wagner and Walker had been riding around together. According to Agent Wactor, Spring also stated that "prior to Mr. Walker's going down into the ravine that he had obtained the .22 caliber pistol from Mr. Walker" and, in another portion of Wactor's testimony, that "[Spring] did admit to getting Walker's gun away from him before he went to flush deer out of [the] ravine." Agent Wactor also asked Spring, "Is it safe to assume that you, Wagner and Walker went out together and that only you and Wagner came back alive?" Spring replied, "Yeah, you could say that." According to the agents, Spring either grinned or laughed while saying this.

The record contains no recording or transcript of the July 13 interrogation. Only Agent Wactor's brief, handwritten notes were placed into evidence. It is not clear in what sequence the questions concerning the Walker homicide were asked and answered, or not answered, and at what points in the interview these questions were asked. Nor can we tell with any certainty what unrelated questions, if any, were asked in between questions concerning the killing of Walker. Both agents testified that whenever Spring stated that he did not want to talk about some aspect of the Walker

murder, the subject was changed to a separate topic. Agent Wactor testified that the questions about the killing of Walker were not interspersed with questions about wholly unrelated matters; Agent Patterson gave contrary evidence that general conversation about matters unrelated to the Walker homicide occurred between questions about Walker's death.

The district court declined to suppress the July 13 statement. As part of its findings, the court stated, "Spring did understand that he had the right not to answer questions, and exercised that right with respect to several specific questions." The court again rejected Spring's argument that the waiver was not valid because he was not advised prior to the interview that he would be questioned about the homicide. The court concluded that the questions concerning the homicide were not "ruse questions" designed to trick an unwary person and noted that at the time of the interview, Spring had already talked with the Colorado authorities about the murder and that an information and warrant charging Spring with Walker's murder had been issued. Through the testimony of the agents, portions of the July 13 statement subsequently were received in evidence at trial.

The court of appeals held that the trial court committed reversible error in admitting the statement of July 13, 1979, for two reasons. First, the court of appeals noted that "when the agents began asking about the homicide, Spring answered, 'I'd rather not talk about that.' The agents shifted the interview to other topics, but returned again to the homicide. This process was repeated until the agents obtained an incriminating response." *People v. Spring*, 671 P.2d at 967. The court of appeals noted also that "[o]fficers

who meet with a refusal to make any statement during an attempted in-custody interrogation are not permitted periodically to repeat the procedure until the accused finally makes a statement. *Dyett v. People*, 177 Colo. 370, 494 P.2d 94 (1972)." *Id.* For that reason, the court concluded that Spring exercised his right to silence as to matters concerning the homicide, and the officers violated that right by continuing to question Spring and obtaining a statement. Second, the court again held that Spring was entitled to renewed *Miranda* warnings when the agents began to question him about the murder, which was a topic not related to their stated purpose for the interview. *People v. Spring*, 671 P.2d at 967.

We conclude that the statement should have been suppressed, although we do not agree with all of the reasons given by the court of appeals. In particular, for the reasons discussed above, we do not approve of the court of appeals' adoption of a *per se* rule rendering invalid any waiver of *Miranda* rights when the defendant answers questions, without a renewed *Miranda* advisement, on a subject about which he was not informed before the interrogation. We conclude, however, that the evidence in the record, when viewed in the light of the totality of the circumstances and the requirements of *Miranda v. Arizona*, does not support the trial court's finding that Spring's July 13 statement was the result of a valid waiver of constitutional rights.

In *Miranda v. Arizona*, the United States Supreme Court stated that the procedure to be followed after a *Miranda* advisement is clear. "If the individual indicates in any manner, at any time prior to *or during questioning*, that he wishes to remain silent, the interrogation must

cease." 384 U.S. at 473-74 (footnote omitted; emphasis added). We recognize that an individual might refuse to answer certain questions yet voluntarily and intelligently decide to answer others during the course of a single interrogation, and a waiver established under such circumstances may be valid and effective. However, it must not be forgotten that the government carries a "heavy burden" to demonstrate that the waiver is voluntary. *Miranda v. Arizona*, 384 U.S. at 475. *See also People v. Fish*, 660 P.2d at 508. Once the defendant has indicated in any way that he does not wish to answer a question or questions, the interrogating officers have an affirmative and emphatic duty to determine whether the suspect is in fact exercising his privilege against self-incrimination in all respects or is merely reluctant to answer particular questions. *See People v. Lowe*, 200 Colo. at 477, 616 P.2d at 123-24, *Dyett v. People*, 177 Colo. at 372-73, 494 P.2d at 95. Simply continuing the interrogation along similar or even unrelated lines rarely will satisfy the requirements of *Miranda*. And the fact that a statement is eventually made by the defendant is not determinative. "[A] valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained." *Miranda v. Arizona*, 384 U.S. at 475; *People v. Pierson*, 670 P.2d at 776.

Here, there is no evidence that the ATF agents made any effort to reaffirm Spring's decision to waive his constitutional rights after he declined to answer particular questions. Nor did they make any effort to establish that by refusing to answer certain questions about the shooting of Walker, Spring did not intend to exercise his privilege against self-incrimination with regard to the entire subject from that point forward. They simply continued to interrogate Spring until they received answers to questions about

the Walker homicide. Without a transcript or equivalent evidence showing the sequence and wording of the questions asked and Spring's answers, we cannot say that the evidence supports the district court's finding that Spring only exercised his right to remain silent "with respect to several specific questions," and that the waiver remained valid with respect to all of his answers to the other questions.

For this reason alone, the record does not support the trial court's finding that the prosecution met its burden of proving by clear and convincing evidence that the defendant knowingly, intelligently and voluntarily waived his constitutional rights to remain silent and to have counsel present when he uttered the July 13 statement. We agree with the court of appeals that the trial court erred in failing to suppress this statement.

The People have not argued that the admission of this statement was harmless error, and it obviously cannot be considered harmless under the circumstances. Before a constitutional error can be considered harmless, a court must be satisfied beyond a reasonable doubt that the error did not affect the jury's ultimate resolution of the case. *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967); *LeMasters v. People*, 678 P.2d 538, 538-39, 544 (Colo. 1984). The matters contained in the statement of July 13 were generally cumulative of other evidence, assuming, for this purpose, that the May 26 statement was properly admitted.[7] However, the admission at trial of the particular statement from Spring concerning Walker's gun, a fact added by the July 13 statement, was clearly prejudicial to Spring. At trial, both Agent Wactor and Agent Patterson testified that Spring said he talked

Walker into leaving his firearm behind in the van before Walker went towards the ravine. A jury might infer from this evidence the necessary premeditation on the part of Spring on the grounds that Spring intentionally disarmed Walker so that Walker could not protect himself. As Spring's primary defense at trial was that he had no knowledge that Wagner was going to shoot Walker that evening, this added fact, although circumstantial, cannot be considered harmless.

Accordingly, the admission of the July 13 statement constitutes reversible error, and Spring's conviction must be reversed for that reason. A new trial is required , and, as the court of appeals ordered, the trial court must resolve the issue of attenuation if the People seek the introduction of the May 26 statement on retrial.

III.

Spring argues that the trial court prevented him from telling his side of the story to the jury. The scope of the direct examination of witnesses, including witnesses for the defense, is generally a matter within the sound discretion of the trial court. *People v. Reynolds*, 194 Colo. 543, 547, 575 P.2d 1286, 1290 (1978). However, an abuse of discretion by a trial court in restricting the direct examination of defense witnesses may compel the reversal of a conviction. *Id.* We conclude that the trial court unduly restricted Spring's own testimony, although it is not necessary for us to determine whether reversible error occurred given our holding in part II. Because the errors are likely to occur again upon a retrial of Spring, we elect to address these evidentiary

questions briefly in this opinion.[8]

The first ruling objected to occurred when Spring sought to explain why he and Wagner invited Walker to accompany them on the elk hunt. According to Spring, Wagner and he went hunting and shot a deer the night before, and Spring related this to Walker. The trial court would not allow Spring to testify that Walker responded by being upset about their failure to invite him along and that, because Walker was upset, Spring and Wagner included him in their plans to go elk hunting the next night. The trial court also refused to allow Spring to testify as to statements made by Wagner and by Mike Knez, a friend of Spring and Wagner, that were made on the day of the shooting and also concerned the plans for the elk hunt. The trial court excluded these statements, concluding:

> The danger—the risk here as I perceive it, Mr. Bratfisch [Spring's attorney], is that through this witness and his own statements concerning what was said in conversations of other people, he is in essence stating not what is happening in his mind but creating conversations which he—or discussing conversations which tend to have—indicate that there was a corroborative effect from other persons as to whatever may have been in his mind and I think this is possibly misleading and I think it's clearly hearsay and shouldn't come in for that purpose. I think the witness is entitled to say what his—was in his mind at that time. But I don't think he's entitled to try to corroborate it by embellishing upon particular conversations that occurred which are hearsay and would constitute hearsay evidence.

Spring argues that these statements were relevant and were not hearsay, as their admission was not sought to prove the truth of the matters asserted but to explain

Spring's state of mind, i.e., his innocent motive in participating in the elk hunt.

The defendant is correct. Out-of-court statements offered not to prove the truth of the matter asserted but offered because they tend to explain the state of mind of someone other than the declarant are not hearsay and should be admitted if relevant. *See* CRE 801(c) (definition of "hearsay"); *People v. Burress*, 183 Colo. 146, 150-54, 515 P.2d 460, 462-64 (1973). Also, the defendant is entitled to present evidence corroborating his own testimony about his actions and mental state. *See People v. Green*, 38 Colo. App. 165, 167, 553 P.2d 839, 840 (1976). The fact that the corroborative evidence in this instance also was in the form of testimony by the defendant is simply a factor for the jury to consider in deciding what weight to give to that corroboration. The trial court should not exclude this evidence if properly presented on retrial.

Similarly, Spring argues that the district court would not allow him to testify as to what Wagner said to Spring, or to others in Spring's hearing, that compelled Spring to assist Wagner in concealing the murder and to refrain from telling the complete story when first interviewed by law enforcement officials. Without going into detail about the merits of individual rulings, we conclude that evidence of this type is relevant and should be admitted on retrial if presented by the defendant in proper form.

IV.

For the reasons given, the judgment of the court of appeals is affirmed, and the case is remanded to that court to be returned to the trial court for further proceedings consistent with this opinion.

JUSTICE ERICKSON dissents in part and concurs in part.

JUSTICE ROVIRA joins in the dissent and concurrence.

JUSTICE KIRSHBAUM does not participate.

FOOTNOTES

1. As one issue in his petition for certiorari, Spring argued that the trial court improperly limited his opening statement, his cross-examination of two prosecution witnesses and his direct examination of defense witnesses. We did not order review of this entire issue; rather, we granted certiorari only to review Spring's assertion that he was improperly prevented from presenting evidence on his own behalf through defense witnesses. Nevertheless, both the People and Spring argued the "opening statement" and "cross-examination" issues in their briefs. We decline to discuss these issues other than to state that we have reviewed the record and conclude that the district court did not abuse its discretion or commit reversible error with regard to these matters.

2. Spring was charged with that form of first degree murder that is committed "[a]fter deliberation and with the intent to cause the death of a person other than [the actor]." § 18-3-102(1)(a), 8 C.R.S. (1978).

3. We have held that a trial court must follow a two-step analysis when reviewing a motion to suppress a statement—first determining whether the defendant voluntarily, knowingly and intelligently waived his *Miranda* rights and, if so, then determining whether the statement was made voluntarily. *People v. Fish*, 660 P.2d at 508. The prosecution carries a different burden with respect to each phase of the analysis. *Id.* We recognize, however, that both steps involve an inquiry into the totality of the circumstances surrounding the making of the statement in an attempt to ascertain the voluntariness of the defendant's actions. For that reason, in many cases the consideration of the two factors may not be neat and distinct. The findings made by the trial court in this case reflect that reality—the court did not analyze each issue separately but rather reviewed the factual circumstances surrounding the making of the statements and made joint conclusions as to the waiver and the voluntariness of each statement. As long as the evidence supports findings by a trial court that a voluntary, knowing and intelligent waiver and a voluntary statement were made by the defendant when viewed in the light of the total circumstances, taking into account the separate burdens placed on the prosecution and the real differences between the two factors, the findings should not be rejected even though the trial court does not cleave the analysis formalistically into two parts.

4. Although these are rights that are guaranteed to the defendant, *see Miranda v. Arizona*, 384 U.S. at 444-45, 473-74, *Miranda* did not require that the defendant be advised of these rights, *Miranda v. Arizona*, 384 U.S. at 444, 467-73, 479; *People in the Interest of M.R.J.*, 633 P.2d 474, 476 (Colo. 1981). Even though not required, we commend and encourage the inclusion of this information in any *Miranda* advisement.

5. A contrast to the other subject matter of the March 30 interview may

be instructive. Given the circumstances surrounding Spring's arrest and subsequent interrogation, it could not be argued convincingly that the ATF agents were required to inform Spring explicitly before the interrogation that he would be questioned about the firearm transaction in the parking lot and that any waiver obtained without such an advisement would be invalid.

6. In their petition for rehearing, the People for the first time raise the argument that *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), makes the statement of May 26, 1979, admissible without regard to attenuation. We elect not to address this issue, but the People are free to assert this argument to the trial court in further proceedings on remand.

7. As previously noted, however, the admissibility of the May 26 statement is dependent upon the determination of an attenuation issue. *See* Part II B 2, above.

8. Spring also argues that the trial court improperly limited his examination of two other defense witnesses, Michael Kopp and Becky Spring. After reviewing the record, we conclude that each of the matters challenged either is not likely to recur in a new trial or that the district court did not err, and we decline to discuss these matters further.

JUSTICE ERICKSON dissenting in part and concurring in part:

I respectfully dissent to part II of the majority opinion. The court of appeals held that a suspect cannot voluntarily waive his *Miranda* rights unless he is informed of the crime about which he is to be questioned. *People v. Spring*, 671 P.2d 965 (Colo. App. 1983). The majority rejects the absolute rule adopted by the court of appeals and holds that a suspect's knowledge of the crime is only one factor to be considered in determining the validity of the waiver. In this case, however, the court concludes that the failure of the federal agents to inform Spring that he was a suspect in the Walker homicide is a sufficient basis for holding his waiver of *Miranda* rights on March 30, 1979 invalid. I disagree.

Law enforcement officers have no duty under *Miranda* to inform a person in custody of all charges being investigated prior to questioning him. *Carter v. Garrision*, 656 F.2d 68, 70 (4th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 952 (1982); *State v. Carter*, 296 N.C. 344, 250 S.E. 2d 263, 268, *cert. denied*, 441 U.S. 964 (1979); W. LaFave & J. Israel, *Criminal Procedure* 306 (1985). All that *Miranda* requires is that the suspect be advised that he has the right to remain silent, that anything he says can and will be used against him in court, that he has the right to consult with a lawyer and to have the lawyer present during interrogation, and that if he cannot afford a lawyer one will be appointed to represent him. *Miranda v. Arizona*, 384 U.S. 436, 467-79 (1966). As one court has stated:

> We have serious reservations about an interpretation of *Miranda v. Arizona* . . . which would require that before custodial interrogation begins, in addition

to the mandated declarations, a statement must be made by the police as to the nature of the crime under investigation. That landmark decision was painstakingly specific in listing the basic constitutional rights which the police must propound to a suspect before he is questioned. Nowhere is there the slightest indication that there must be included a warning about the nature of the crime which has led to the interrogation conference, what the penalty is for the offense, what the elements of the offense consist of, and similar matters. ... In a sense, all of these elements might conceivably enter into an "intelligent and understanding" rejection of an offer for the assistance of counsel, but the simple answer is that *Miranda* does not by its terms go so far. It requires that the accused be advised of his rights so that he may make a rational decision, not necessarily the best one or one that would be reached only after long and painstaking deliberation. Indeed, it may be argued forcefully that a choice by a defendant to forego the presence of counsel at police interrogation is almost invariably an unintelligent course of action. It is not in the sense of shrewdness that *Miranda* speaks of "intelligent" waiver but rather in the tenor that the individual must know of his available options before deciding what he thinks best suits his particular situation. In this context intelligence is not equated with wisdom.

Collins v. Bierly [sic], 492 F.2d 735, 738-39 (3rd Cir.), *cert. denied*, 419 U.S. 877 (1974) (footnote and citation omitted).

Here, Spring was advised twice of his *Miranda* rights before he was questioned on March 30, 1985—first at the time of his arrest and then immediately before the interrogation. Spring was also informed that he had the right to stop the questioning at any time. Thus, the warnings given to Spring exceeded the requirements of *Miranda*.

In concluding that Spring validly waived his *Miranda* rights on March 30, 1979, the trial court properly considered the totality of the circumstances under which the

waiver was made. *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979); *People v. Pierson*, 670 P.2d 770, 775 (Colo. 1983). The court found that Spring "was aware of his right to remain silent, to have counsel present during interrogation, to stop the interrogation at any time; and that his responses were made freely, voluntarily and intelligently." The trial court's findings should not be disturbed on appeal if supported by adequate evidence in the record. *Pierson*, 670 P.2d at 770, 776.

Here, there is ample evidence to support the trial court's conclusion that Spring waived his *Miranda* rights. Prior to any questioning, Spring signed a written acknowledgment and waiver of his rights to remain silent and to have counsel present. Such an express waiver is strong proof of its validity. *North Carolina v. Butler*, 441 U.S. at 373. Additionally, nothing in the record suggests that Spring did not understand the warnings given to him, the nature of his fifth amendment rights, and the consequences of waiving those rights. *Fare v. Michael C.*, 442 U.S. 707, 726 (1979). He was a convicted felon who had considerable experience with the police. He was not "worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit." *Id.* at 727.

The majority nonetheless rejects the findings of the trial court on the sole ground that Spring was not advised that he would be questioned about the Walker homicide. In my view, a waiver of *Miranda* rights should never be held invalid simply because the suspect is not informed or does not know in advance of all matters that are under investigation and will be the subject of interrogation. The effect of the majority opinion is to add to the *Miranda* warnings the requirement that the police disclose all possible crimes that

might be the subject of interrogation. The practical difficulties of satisfying this requirement are obvious. Prior to questioning a suspect, the police may have insufficient information to determine what charges will ultimately be filed against him. The nature of the offense may depend upon circumstances unknown to the police, such as whether the suspect has a criminal record. It may also turn upon an event yet to occur, such as whether the victim of the crime dies. Therefore, I reject the majority's conclusion that Spring's waiver of his *Miranda* rights on March 30, 1979 was invalid simply because he was not informed of all matters that would be reviewed when he was questioned by the police.

I would also uphold the trial court's refusal to suppress the statements made by Spring to Colorado law enforcement officers on May 26, 1979. When Spring was told that the Colorado authorities wished to speak with him, he readily agreed to do so. The officers orally advised Spring of his *Miranda* rights, and he then signed a written acknowledgment and waiver form. Spring told the officers that he agreed to talk to them about the Walker homicide because he "wanted to get it off his chest." The interview was conducted in the day room of the jail and lasted only one hour and thirty minutes. Spring talked freely to the officers about his participation in the Walker homicide. At no time did he refuse to answer questions or request the presence of counsel. Nothing in the record indicates that the officers conducted the interview in a coercive manner. At the conclusion of the interview, Spring read, edited, and signed a written statement prepared by one of the officers summarizing the interview. In my view, the trial court correctly found that the statement given by Spring was made freely, voluntarily, and intelligently, after a proper *Miranda*

advisement and waiver.

Finally, I agree with the majority that the trial court erred in not suppressing the statement made by Spring on July 13, 1979. In light of Spring's refusal to answer certain questions regarding the Walker shooting, the agents should have then determined if Walker sought to invoke his right against self-incrimination on that subject. Their failure to do so renders Spring's purported waiver of his *Miranda* rights invalid.

I am authorized to say that Justice Rovira joins me in this dissent and concurrence.

January 13, 1986

No. 83SC145 and 83SC155 — *The People of the State of Colorado vs. John Leroy Spring*

Please substitute the enclosed pages 22, 29, 30 and 34 with the like pages of the opinion issued on December 2, 1985.

The opinion was modified, and as modified, the Petitions for Rehearing were denied.

JUSTICE ERICKSON and JUSTICE ROVIRA would grant the People's petition.

JUSTICE KIRSHBAUM does not participate.

MAC V. DANFORD, Clerk
Colorado Supreme Court

By: _____
Chief Deputy

NOTE: The modifications basically represent the addition of footnote 6, reference on page 22 just above "3.". Subsequently the footnote *numbers* on pages 29 and 30 also had to be changed. On page 34, the text of the new footnote 6 has been inserted and the *numbers* only of the footnotes that follow were changed.

CERTIFICATE OF MAILING

I, John Milton Hutchins, a member of the bar of this court, herewith certify that the within PETITION FOR WRIT OF CERTIORARI has been deposited in the United States Mail, first-class postage prepaid, addressed to Mr. Joseph Spaniol, Jr., Clerk of the Court, Supreme Court of the United States, Washington, D.C. 20593 and that to my knowledge the mailing took place on March 14, 1986, within the permitted time for filing the brief.

FOR THE ATTORNEY GENERAL

_____

JOHN MILTON HUTCHINS, 7529
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AG Alpha No. DA NN GGFP
AG File No. BAP8601119/2C

Subscribed and sworn to before me in the County of _____, State of Colorado, this ____ day of _____ 1986.

_____

NOTARY PUBLIC

My Commission expires:

_____

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 14th day of March 1986, addressed as follows:

Lynda H. Knowles
Deputy State Public Defender
1362 Lincoln Street, Suite 205
Denver, CO 80203

AG File No. BAP8601119/C

No. 85-1517

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO

Petitioner,

v.

JOHN LEROY SPRING

Respondent.

On Writ of Certiorari to

the Supreme Court of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID F. VELA
Colorado State Public Defender

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TABLE OF CONTENTS

TABLE OF CASES CITED

QUESTION PRESENTED FOR REVIEW

Whether the Colorado Supreme Court correctly applied the applicable law in determining that under the totality of the circumstances the prosecution had not met its burden of proof that Mr. Spring had validly waived his rights prior to interrogation?

No. 85-1517

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO

Petitioner,

v.

JOHN LEROY SPRING

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE FACTS

On March 30, 1979, Respondent, John Spring, was arrested by federal Alcohol, Tobacco and Firearms agents during a firearms transaction in Kansas City, Missouri. At that time, the federal agents had been told by George Dennison, the informant who had arranged the firearms transaction, that Mr. Spring might have been involved in a homicide in Craig, Colorado.

While Mr. Spring was incarcerated in Missouri, he was interrogated on three separate occasions with regard to the Colorado homicide, twice by federal ATF agents, and once by Colorado authorities. The Colorado Supreme Court found that both of the ATF statements were unconstitutionally obtained, and remanded the third statement to the District Court for a hearing on attenuation.

The circumstances of those three interrrogations were as follows:

A. Statement of March 30, 1979.

On March 30, 1979, Mr. Spring and Robert Beam were arrested by federal ATF agents for interstate transportation of stolen firearms and related offenses. The arrest was made during an actual hand-to-hand sale of weapons to federal agents, which had been set up in part by informant George Dennison. Dennison had previously informed the federal agents that Mr. Spring and a man named

Donald Wagner had told him of their involvement in the death of Donald Alan Walker in Colorado. After the weapons were seized and Spring and Beam arrested, Mr. Spring was placed in the back seat of an ATF vehicle and advised of his rights. Later, at the ATF office, Mr. Spring was "processed," (fingerprinted, photographed, etc.), then readvised and questioned by agents Wactor and Patterson, two of the agents who had been present at his arrest. The agents began by asking Spring about the stolen firearms from Iowa that had led to his arrest and federal charges. Later in the interrogation, without informing Mr. Spring of their intent to question him about the Colorado homicide, they began asking him about that matter. First, he was asked if he had a criminal record. He admitted that he had a juvenile murder record for shooting his aunt when he was ten years old. The agent then asked Spring if he had ever shot anyone else. He responded that he had "shot another guy once." Then he was asked if he had ever been to Colorado, and he said no. The agent then asked him if he had shot Donald Walker in Colorado and thrown him into a snowdrift, to which he again responded, "no." (Transcript, Volume 2: Suppression Hearing)

Based on the totality of the circumstances, the Colorado Supreme Court found that this statement was not shown to have been obtained pursuant to a valid waiver of Mr. Spring's constitutional rights.

B. Statement of May 26, 1979.

On May 26, 1979, Mr. Spring was interviewed at the Jackson County Jail in Kansas City, Missouri, by Detective James Curtis of the Moffat County, Colorado Sheriff's department, and by Agent Leo Konkel of the Colorado Bureau of Investigation. The purpose of the interview was to obtain information about the death of Donald Walker from Mr. Spring, who was a suspect in the case. At the suppression hearing, Detective Curtis stated that he and Konkel had previously been informed of the results of the March 30 interrogation of Mr. Spring by ATF agents. Agent Konkel testified that he first told Mr. Spring not to talk, but just to listen carefully. He told Mr. Spring that he was a suspect, and also told him what they had learned about the case from their investigation that had led to his being a suspect. He then advised Mr. Spring of his rights, and Mr. Spring agreed to talk. (Transcript, Volume 2: Suppression Hearing).

The Colorado Supreme Court remanded the case to the District Court with instructions that prior to the retrial of the case, the court should resolve the question of whether the taint of the March 30 statement was sufficiently attenuated to make this statement admissible.

C. Statement of July 13, 1979.

The same interrogation technique used by the ATF agents on March 30 was used again on July 13. Federal ATF agents Wactor and Patterson again visited Mr. Spring at the jail after he had entered his guilty plea on the federal firearms charge. Their purported reason for the July 13 interview was to obtain information about the whereabouts of additional firearms and explosives that they had learned might still be hidden in Iowa. When they advised Spring and began the interview, they did not tell Mr. Spring that he would be questioned about the Walker homicide. When Spring was advised of his rights, he stated that he would not sign anything without his lawyer, but he would talk with the agents. The questioning initially involved guns the agents thought might be hidden in a pond and a cave in Iowa. Questions about other related subjects, such as firearms fences in the Kansas City area, were also asked. The purpose of the interview was not to obtain information to support additional firearms charges against Spring, but merely to clear up the firearms matter, and to perhaps return some firearms to their owners and disarm potentially dangerous explosives. During the interview, Mr. Spring willingly answered questions about firearms and explosives, and about some other matters. He was asked about the .22 pistol he had been carrying when he was arrested, and he replied that it was Don Walker's gun. However, when asked if he had taken the gun off Walker's body, he responded, "I'd rather not talk about that." Later, he was asked if he had shot Walker, and he again stated, "I'd rather not talk about that." And then, when asked if it was Wagner who had shot Walker, he replied yet again, "I'd rather not talk about that." The two agents who testified at the suppression hearing gave conflicting testimony on the way the questioning had been conducted, one stating that when Spring had indicated an unwillingness to talk about Walker's death, they had turned temporarily to other subjects unrelated to the homicide, and then eventually returned to the homicide. However, the other agent testified that once they began asking about the Walker homicide they stayed generally with that topic. At any rate, during the course of that

interview, the agents ultimately did obtain several statements relating to the homicide. As the Colorado Supreme Court observed, because the interview was not taped or recorded in any way, the only record of it was Agent Wactor's brief notes and the agents' memories. Thus, it is not possible to tell where in the interview and in what sequence the questions relating to the Walker case were asked, and what responses Mr. Spring actually made to those questions. The record also fails to reveal what, if any, unrelated questions were asked in between questions concerning the death of Walker. (Transcript, Volume 2: Suppression Hearing).

As to this statement, like the March 30 statement, the Supreme Court found that based on the totality of the circumstances a valid waiver of Mr. Spring's constitutional rights had not been shown.

ARGUMENT

THE COLORADO SUPREME COURT CORRECTLY APPLIED THE APPLICABLE LAW IN DETERMINING THAT UNDER THE TOTALITY OF THE CIRCUMSTANCES THE PROSECUTION HAD NOT MET ITS BURDEN OF PROOF THAT MR. SPRING HAD VALIDLY WAIVED HIS RIGHTS PRIOR TO INTERROGATION.

In Miranda v. Arizona, 384 U.S. 436 (1966), this Court held that suspects in custodial interrogation must be informed of their fifth and sixth amendment rights to remain silent and to be represented by counsel. Any waiver of these rights must be knowing, intelligent and voluntary, and must be made with an understanding of the consequences of waiving the rights. "It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." Id., at 469. The validity of a waiver is determined on the basis of the "totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." Fare v. Michael C., 442 U.S. 707, 725 (1979), citing Miranda v. Arizona, supra, 384 U.S. at 475-77. In Johnson v. Zerbst, 304 U.S. 458 (1938), this Court announced guidelines for determining the validity of a waiver, based on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused," Id., at 464; and in Moran v. Burbine, ___ U.S. ___, No. 84-1485 (U.S. March 10, 1986), this Court stated:

> The inquiry has two distinct dimensions. First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. (citations omitted)

In this case, the Colorado Supreme Court reviewed three statements made by Respondent, John Spring, and correctly determined that, under the totality of the circumstances surrounding the interrogations, two were inadmissible and the

third required a remand for a finding on attenuation. The record supports the Court's finding that the prosecution had failed to show that Mr. Spring's statements to federal Alcohol, Tobacco and Firearms officers concerning a Colorado homicide were the product of a "knowing, intelligent and voluntary" waiver of his rights.

A. Statement of March 30, 1979.

Contrary to the Colorado Attorney General's suggestions in its formulation of the questions presented, the Colorado Supreme Court did not hold that a valid waiver of rights requires "that the defendant be aware, prior to interrogation, of all of the possible subjects of interrogation." (Petition, Issues Presented for Review) To the contrary, the Court expressly rejected the holding of the Colorado Court of Appeals that such awareness was a prerequisiste to a valid waiver. The Court stated:

> [T]he validity of Spring's waiver of constitutional rights must be determined upon an examination of the totality of the circumstances surrounding the making of the statement to determine if the waiver was voluntary, knowing and intelligent. No one factor is always determinative in that analysis. Whether, and to what extent, a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is simply one factor in the court's evaluation of the total circumstances, although it may be a major or even a determinative factor in some situations.

People v. Spring, 713 P.2d 865 (Colo. 1985) (emphasis added; citations omitted)

The Court indicated that "it is important to determine whether the questions were related to crimes or general subject matter about which the suspect anticipated interrogation, or whether the police led him to believe that he would be questioned about one crime but then interrogated him about a totally unrelated offense." Id., at 713 P.2d 873.

The Court then reviewed the relevant circumstances surrounding the interrogation. After first noting the failure to advise Mr. Spring that he would be questioned about the Colorado homicide, the Court listed several factors which were strongly suggestive of a deliberate intent to mislead Mr. Spring about the subject matter of the interrogation:

> Here, the absence of an advisement to Spring that he would be questioned about the Colorado homicide, and the lack of any basis to conclude that at the time of the execution of the waiver, he reasonably could have expected that the interrogation would extend to that subject, are

determinative factors in undermining the validity of the waiver. The ATF agents did not advise Spring that a part of their interrogation would include questions about the Colorado homicide prior to Spring's decision to waive his constitutional rights and to answer questions. Spring had no reason to suspect that the federal agents who had just arrested him in Kansas City during a firearms transaction that allegedly violated federal law would question him about a murder that occurred in Colorado, a crime not only in a distant jurisdiction but also outside of the normal purview of the federal Bureau of Alcohol, Tobacco and Firearms and totally unrelated to the transaction that gave rise to the arrest and interrogation. Moreover, the federal crime that occasioned the interrogation, and about which Spring was cognizant when he signed the written waiver and agreed to answer questions, represented a relatively less serious matter than first degree murder.

Id., at 713 P.2d 874. (emphasis in original)

The Court then noted that the record revealed little concerning Mr. Spring's intelligence or acquaintance with the criminal justice system, also relevant factors under Johnson v. Zerbst, supra. In summary, the Court found,

> Given these facts, it cannot be said that the prosecution carried its burden of proving by clear and convincing evidence that Spring made a voluntary, knowing and intelligent decision to forego counsel and to answer questions concerning the murder.

Id., at 713 P.2d 874.

The foregoing reveals a careful and thorough analysis of the totality of the circumstances, as is required in waiver-challenge cases. Fare v. Michael C., supra,; Johnson v. Zerbst, supra. In a subsequent case, People v. Jones, No. 83SC414 (Colo. Jan. 13, 1986), the Colorado Supreme Court has clarified its application of the totality of circumstances test. In the Jones case, the defendant had used the name of Angel Santiago in reporting to New Hampshire authorities that his car had been stolen. Investigation revealed that Angel Santiago's car had already been reported stolen, after his murdered body had been found in Colorado. The man representing himself as Mr. Santiago was then questioned about both the car and the Colorado homicide. The Colorado Supreme Court stated:

> This is unlike the factual scenario in Spring. The federal agents in Spring began questioning the defendant about firearms charges and then asked about an unrelated homicide.... While the defendant in Spring had no reason to believe that the federal agents who questioned him about federal charges would also inquire about a Colorado homicide, the defendant here could have reasonably expected to be asked about the circumstances surrounding his ownership and possession of the car he had reported stolen. In our view, the defendant was adequately advised of the subject matter of the interview at the time he waived his Miranda rights.

People v. Jones, Id., Slip Opinion at 14. (Appendix A)

The distinction drawn by the Colorado Supreme Court between its Spring and Jones decisions demonstrates that the Court is, in fact, properly applying the appropriate totality of circumstances test to the facts of each particular case in determining the validity of challenged waivers.

B. Statement of May 26, 1979.

Having found the March 30 statement unconstitutional, the Colorado Supreme Court remanded the case for a finding of attenuation as to the May 26, 1979 statement. Since the District Court has not yet heard that matter, the question is not ripe for review by this Court. The Colorado Attorney General's suggestion that this Court should find the statement admissible without regard to attenuation under Oregon v. Elstad, ___ U.S. ___, 105 S.Ct. 1285, 84 L.Ed.2d 230 (1985), reflects a misinterpretation of the Elstad decision. That case only applies to a "simple failure to administer Miranda warnings," absent "any coercion or improper tactics," in which instance a finding of attenuation may be unnecessary. Id., 84 L.Ed.2d at 230, 232. This case obviously involves more than a "simple" Miranda violation, in light of the tactics employed to obtain Mr. Spring's alleged waiver. Thus, the presumption of taint, and the necessity for an inquiry into attenuation, remains.

C. Statement of July 13, 1979.

The Colorado Attorney General suggests in the statement of questions presented that the correctness of the Colorado Supreme Court's ruling that this statement was inadmissible depends on whether the police have a duty to stop interrogation and redetermine the scope of the suspect's waiver when the suspect "refuses to answer a particular question." (Petition, Issues Presented for Review) The Colorado Supreme Court's review of the totality of the circumstances reveals that, in fact, the statement was unconstitutional for the same reasons that the March 30 statement was unconstitutional, with several additional factors making that conclusion even more unavoidable.

As with the March 30 statement, the Court analyzed the totality of the circumstances under which the July 13 statement was made. At the outset of its analysis, the Court observed that this interview, like that first one, was conducted

by ATF agents. It was conducted after Mr. Spring had entered his guilty plea on the firearms charge, and,

> the trial court found that the primary purpose of conducting this interview, a purpose apparently made known to Spring at the outset, was to obtain information from him concerning the whereabouts of additional firearms and explosives. When the interview began, Spring was not told that he would be questioned about the Walker homicide.

People v. Spring, supra, 713 P.2d at 876.

Under this portion of the analysis alone, the statement would have had to have been suppressed. On July 13, having already pled guilty and been sentenced on the firearms charge, Mr. Spring had all the more reason to cooperate as much as possible with the ATF officials as to firearms and related topics. He had nothing to lose and could only gain by his cooperation, in terms of post-conviction treatment. Here, as before, when the agents approached and advised him, they gave him no indication of their intent to shift the interrogation to the Colorado homicide case. He was specifically not told that he would be asked about the homicide. However, as to this statement, the Court noted even more circumstances vitiating the alleged waiver:

> The interrogation apparently began with a wide-ranging discussion of the whereabouts of various firearms and explosives of which Spring might be aware, along with related subjects. As part of this discussion, Spring was asked where he had obtained a .22 caliber pistol that the agents had seized from him at the time of his arrest. Spring replied that it had been Walker's gun. Asked if he took the gun off Walker's body, Spring said, "I'd rather not talk about that." Later, the agents asked Spring if he had shot Walker and, subsequently, if Wagner had shot Walker. To both questions, Spring again replied, "I'd rather not talk about that."

Id., 713 P.2d at 876.

In finding the July 13 statement inadmissible, the Colorado Supreme Court reiterated its rejection of a per se rule that a suspect must be readvised before he is asked questions on a subject about which he was not informed before the interrogation. The Court did, however, call attention to the agents' refusal to honor what was apparently a repeated invocation of Mr. Spring's right to silence in response to questions about the homicide.

The Court acknowledged that a suspect could refuse to answer certain questions, yet voluntarily and intelligently answer others during an interrogation session without vitiating a valid waiver. However, the Court emphasized that the

prosecution bears a "heavy burden" to demonstrate that the waiver is voluntary, citing Miranda. Id., 713 P.2d at 878. The Court then went on to state that once the suspect has indicated that he does not wish to answer a question, the interrogators have a "duty to determine whether the suspect is in fact exercising his privilege against self-incrimination in all respects or is merely reluctant to answer particular questions." Id., 713 at P.2d 878.

In Michigan v. Mosley, 423 U.S. 96 (1976), this Court addressed the Miranda rule that, "if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 423 U.S. at 100, quoting Miranda v. Arizona, supra, 384 U.S. at 473-74. In Mosley, this Court acknowledged the requirement that interrogation cease, and focused inquiry on when and under what circumstances the questioning could legitimately resume. This Court stated:

> To permit the continuation of custodial interrogation after momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned.

423 U.S. at 102. This Court concluded that the admissibility of statements obtained after a person has indicated a desire to remain silent depends on whether his "right to cut off questioning" was "scrupulously honored." 423 U.S. at 104, quoting Miranda v. Arizona, supra. This Court found the challenged statements to be admissible, noting that in that case, the suspect had stated that he did not wish to discuss a series of robberies, at which point questioning ceased and he was returned to his cell. Two hours later, he was questioned by a different officer at a different location, about an unrelated holdup-murder, after having been readvised of his Miranda rights. This Court emphasized that when the suspect declined to discuss the robberies, the police immediately ceased the interrogation, resumed questioning only after a significant period of time, and did not return to the subject of the robberies he had declined to discuss.

In the instant case, when Mr. Spring repeatedly declined to discuss the Walker homicide, the police never stopped the interrogation, but simply kept questioning Mr. Spring until they eventually obtained responses relating to the homicide. Under Mosley, to condone such tactics, "would clearly frustrate the

purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned." 423 U.S. at 102.

In considering the circumstances surrounding the July 13 interrogation, the Colorado Supreme Court reviewed the record, noting that it contained no record of the interview itself, but only Agent Wactor's brief, hand-written notes and the inconsistent testimony of Agents Wactor and Patterson as to the manner in which the interogation was conducted. The Court then stated:

> [T]he evidence in the record, when viewed in the light of the totality of the circumstances and the requirements of Miranda v. Arizona, does not support the trial court's finding that Spring's July 13 statement was the result of a valid waiver of constitutional rights.

People v. Spring, supra, 713 P.2d at 877.

The Court then concluded:

> Here, there is no evidence that the ATF agents made any effort to reaffirm Spring's decision to waive his constitutional rights after he declined to answer particular questions. Nor did they make an effort to establish that by refusing to answer certain questions about the shooting of Walker, Spring did not intend to exercise his privilege against self-incrimination with regard to the entire subject from that point forward. They simply continued to interrogate Spring until they received answers to questions about the Walker homicide. Without a transcript or equivalent evidence showing the sequence and wording of the questions asked and Spring's answers, we cannot say that the evidence supports the district court's finding that Spring only exercised his right to remain silent "with respect to several specific questions," and that the waiver remained valid with respect to all of his answers to the other questions.

Id., 713 P.2d at 878.

Here, again, the Colorado Supreme Court properly applied the totality of the circumstances analysis to the facts surrounding the particular interrogation in question, and found that the statement obtained therein should have been suppressed.

CONCLUSION

In People v. Spring, 713 P.2d 865 (Colo. 1985), the Colorado Supreme Court has applied the appropriate totality of circumstances test in determining the admissibility of challenged statements. The Court's finding that the circumstances of two separate statements obtained by federal ATF agents failed to demonstrate a valid waiver of Mr. Spring's rights is consistent with the facts of this case, as

well as with the applicable decisions of this Court. Thus, this case presents no appropriate grounds for granting the State's Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

I, Peggy O'Leary, counsel of record for John Leroy Spring, Respondent herein, certify that on April 15, 1986, I deposited in the United States Mails, postage prepaid, and properly addressed to the Mr. Joseph Spaniol, Jr., Clerk of the Supreme Court of the United States, Washington, D.C. 20593 the foregoing Brief in Opposition to Petition for Writ of Certiorari.

Peggy O'Leary #8498
PEGGY O'LEARY

CERTIFICATE OF SERVICE

I, Peggy O'Leary, counsel for record for John Leroy Spring, Respondent herein, certify that on April 15, 1986, I served one copy of the attached Brief in Opposition to Petition for Writ of Certiorari on the Honorable John Milton Hutchins, First Assistant Attorney General of the State of Colorado, counsel for Petition, by depositing same in the United States Mails, postage prepaid, addressed as follows:

The Honorable John Milton Hutchins
First Assistant Attorney General
Appellate Section
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CERTIFICATE OF SERVICE

I, Peggy O'Leary, counsel for record for John Leroy Spring, Respondent herein, certify that on April 15, 1986, I served one copy of the attached Brief in Opposition to Petition for Writ of Certiorari on the Honorable Maureen Phelan, Assistant Attorney General of the State of Colorado, counsel for Petition, by depositing same in the United States Mails, postage prepaid, addressed as follows:

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APPENDIX

SUPREME COURT, STATE OF COLORADO — January 13, 1986

No. 83SC401

NICHOLAS J. JONES, — Petitioner,
v.
THE PEOPLE OF THE STATE OF COLORADO, — Respondent.

No. 83SC414

THE PEOPLE OF THE STATE OF COLORADO, — Petitioner,
v.
NICHOLAS J. JONES, — Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED WITH DIRECTIONS

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JUSTICE ERICKSON delivered the Opinion of the Court.

Defendant, Nicholas J. Jones, was convicted of first-degree murder[1] and aggravated robbery[2] following a jury trial. In People v. Jones, 677 P.2d 383 (Colo. App. 1983), the court of appeals reversed the judgments of conviction and remanded the case for a new trial. We granted certiorari to review the decision of the court of appeals.[3] We affirm in part, reverse in part, and remand to the court of appeals with directions to reinstate the judgments of conviction against the defendant.

I.

On August 30, 1979, the body of Angel Santiago was found in Plateau Creek near Grand Junction, Colorado. He had been shot twice in the head. Santiago's wrists were tied behind his back, and his ankles were bound together. Santiago had left his home in Downey, California on August 23, driving a white 1973 Pontiac LeMans, en route to New York. A pathologist estimated Santiago's date of death between August 24 and August 26.

On September 7, at approximately 1:30 a.m., the defendant, accompanied by a male companion, checked into the Holiday Inn in Manchester, New Hampshire. The defendant registered under the name of Angel Santiago and used a VISA credit card bearing Santiago's name. Approximately one-half hour later, the defendant appeared in the hotel lobby and told the desk clerk that his companion had stolen his wallet, credit cards, money,

and car while he was taking a shower. Officer Eugene Cook of the Manchester Police Department was on routine patrol on the morning of September 7 and happened to walk into the Holiday Inn while the defendant was talking to the clerk. The clerk referred the defendant to Officer Cook, and the defendant, still identifying himself as Angel Santiago, reported the theft to Officer Cook. The defendant said that the car was a white 1973 Pontiac with a California registration. Officer Cook obtained the license plate number of the vehicle from the hotel registration card, and relayed the information to the police station. After talking with the defendant, Officer Cook returned to the police station and filed a written report. The vehicle information was entered on the police department's computer, and the police learned that the car had previously been reported stolen and was being sought in connection with a homicide in Colorado. The police then contacted Milo Vig of the Mesa County Sheriff's Department in Colorado. Vig said that his office was investigating the homicide of Angel Santiago and that the victim's car was missing.

Edmond LaBeouf, the Deputy Chief of Police of the Manchester Police Department, was apprised of the foregoing information when he reported for duty at 7:00 a.m. on the morning of September 7. He instructed Officer Cook and another officer to go to the Holiday Inn and ask the defendant to come to the police station to provide further information regarding

the stolen car. The officers were not told to arrest the defendant. The officers went to the hotel and knocked on the door of the room registered to the defendant. Receiving no answer, the officers asked a hotel employee to open the door. The door was chained from the inside, but the officers could see the defendant asleep on a bed. They called out to the defendant and, when he awoke, told him that questions had arisen about the car he had reported stolen and that the police wanted him to come to the station to provide further information. The defendant agreed to go to the station with the officers and was transported there in the officers' patrol car.

At the stationhouse, Officer Cook introduced the defendant to Deputy Chief LaBeouf and Captain Michael Welch, who took the defendant to an interview room. LaBeouf informed the defendant that the car he had reported stolen had previously been reported stolen, and that the police wanted to clear up the matter. LaBeouf said it was standard policy to advise persons of their rights prior to questioning, and he gave the defendant an oral Miranda advisement. See Miranda v. Arizona, 384 U.S. 436 (1966). The defendant said he understood his rights and was willing to talk to the officers.

The officers asked the defendant to describe the route he had travelled from California to New Hampshire. The defendant responded that three weeks earlier he left Costa Mesa,

California with a woman named Julie. The two drove up the West Coast through Oregon and Washington into Canada. They proceeded east across Canada to Montreal. When they reached Montreal, Julie flew back to California. In Montreal the defendant met a man named Steve whose last name was either Corbitt or Carlton. The two men drove south to New Hampshire and stopped at the Holiday Inn in Manchester. It was there that "Steve" stole the defendant's car and personal belongings.

At this point in the interview, LaBeouf told the defendant that an Angel Santiago had been shot to death in Colorado, and that the defendant had registered at the Holiday Inn using a credit card bearing the name of Santiago. LaBeouf then asked the defendant to start over again beginning with his correct name. The defendant paused for a moment, stared at the officers, and said his real name was Nicholas Jones. He stated that he was an escapee from an Alabama prison where he had been serving a sentence for auto theft.

The defendant then gave a second account of his travels. He told the officers that he hitchhiked east out of Las Vegas, Nevada, and obtained a ride from a man named George between August 16 and August 19 in Utah. Several hours after picking the defendant up, the man said that he was going to give his car to the defendant and hitchhike back to California. The man said he would report the car as stolen a few weeks later. The defendant accepted the car and drove across country, eventually stopping in Montreal, where he met "Steve."

The interview lasted from 7:35 a.m. to 9:45 a.m. On the basis of the defendant's admission that he was an escapee from prison, he was arrested and incarcerated as a fugitive from justice.

The defendant was subsequently charged in the Mesa County District Court with the first-degree murder and aggravated robbery of Angel Santiago. At trial the prosecution called James Cooper, who testified that he met the defendant in Las Vegas in August 1979. Cooper said that the defendant stayed with him for several days and then departed without saying where he was going. Cooper also testified that he owned a .22 caliber "Bicentennial Edition" Ruger handgun which he discovered missing shortly after the defendant left.

The evidence at trial also established that two days after the defendant's arrest in New Hampshire, police officers in Maine discovered Angel Santiago's car in the possession of and recently registered to Douglas Copley, who had obtained different license plates. Copley was subsequently identified as the man who checked into the Manchester Holiday Inn with the defendant. Copley led the officers to a handgun, which he had taken from the car and buried several miles from his home. At trial James Cooper identified the weapon as his .22 caliber Ruger handgun. A ballistics expert testified that two of the three shell casings found in the vicinity of Santiago's body were fired in Cooper's gun.

Other evidence against the defendant included the discovery of personal items belonging to Santiago in the defendant's room at the Manchester Holiday Inn. Objects belonging to Santiago were also found in a dumpster in Iowa. A fingerprint lifted from a cigarette carton in the dumpster was identified as the defendant's.

II.

Prior to trial, the defendant filed a motion to suppress the statements he made to the Manchester police. At the suppression hearing, the defendant argued that the Miranda advisement given to him was insufficient because the officers did not inform him that he was suspected of criminal activity. The trial court denied the motion after finding that the defendant was properly advised of his rights, and that he voluntarily agreed to talk to the police officers.[4]

The court of appeals reversed the trial court's denial of the motion to suppress. The court stated:

> Here, defendant was questioned by New Hampshire police after reporting the theft of his automobile. The questions asked by the policemen concerned the registration number and vehicle identification number of the automobile. According to New Hampshire authorities, Miranda warnings were given prior to this questioning as a matter of course. After double checking the information given them by defendant in response to their questions, the investigators had reason to believe defendant had participated in a homicide which occurred in Mesa County, Colorado. Before questioning defendant regarding the Colorado homicide, however, no further advisements were given.

People v. Jones, 677 P.2d at 383. Relying on People v. Spring, 621 P.2d 965 (Colo. App. 1983), the court held that since the defendant was not advised that he was a suspect in the Colorado homicide, the waiver of his Miranda rights was invalid.

A.

Statements made by a defendant during custodial interrogation are admissible only if the prosecution establishes that the defendant was warned of his right to remain silent and his right to counsel prior to any questioning. Miranda v. Arizona, 384 U.S. 436 (1966); People v. Spring, Nos. 83SC145 & 83SC155 (Colo. Dec. 2, 1985). The prosecution must also show that the defendant voluntarily, knowingly, and intelligently waived his Miranda rights. Id. If the defendant's statements were preceded by an adequate Miranda advisement and a valid waiver, a third condition of admissibility is that the statements were voluntary. People v. Pierson, 670 P.2d 770 (Colo. 1983); People v. Fish, 660 P.2d 505 (Colo. 1983).

In this case, a threshold issue is whether the defendant, at the time of making the statements to the Manchester police, was in custody. The trial court made no specific findings on the custody issue, stating only that until the defendant admitted he was an escapee from an Alabama prison, he was not under arrest. The court of appeals also failed to address the issue. In its brief to this court, the prosecution asserts

that the defendant was not in custody at the time he made the statements. Therefore, the prosecution contends the defendant's statements are admissible regardless of the adequacy of the Miranda warnings and the validity of the waiver.

In determining whether a person is in custody, the question is whether a reasonable person in the suspect's position would consider himself significantly deprived of his liberty. People v. Black, 698 P.2d 766 (Colo. 1985); People v. Thiret, 685 P.2d 193 (Colo. 1984). A court must consider the totality of circumstances under which the questioning was conducted, including:

> [T]he time, place and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or nonverbal response to such directions.

People v. Thiret, 685 P.2d at 203. A person may be deemed "in custody" even if he has not been formally arrested by the police. See People v. Johnson, 671 P.2d 958 (Colo. 1983). However, simply because questioning occurs at the police station does not mean that custodial interrogation has occurred. Oregon v. Mathiason, 429 U.S. 492 (1977); People v. Johnson, 671 P.2d at 958.

Here, two police officers were instructed to bring the defendant into the police station for further questioning regarding the stolen automobile. The officers arrived at the defendant's hotel room at approximately 7:00 a.m. When they received no response to their knocking on the door, the officers summoned a hotel employee to open the door. The officers awakened the defendant and requested that he accompany them to the police station. Though the officers did not arrest the defendant, they did not tell him that he was free to decline their request. The officers led the defendant to their patrol car, and one sat in the back seat next to the defendant while the other drove the car to the station. At the stationhouse, the defendant was taken to an eight-by-eight foot interrogation room, given Miranda warnings, and questioned by two officers for two hours and ten minutes. There is no indication in the record that the officers ever told the defendant that he was free to leave. Only fifteen minutes after the interview began, the officers suggested to the defendant that the story he was telling them was a lie and that he should begin again. Under these circumstances, we believe that a reasonable person in the defendant's position would have considered himself significantly deprived of his liberty. Therefore, the defendant's statements to the Manchester police were the product of custodial interrogation.

B.

We must next determine whether the defendant's statements were preceded by adequate warnings and a valid waiver. The trial court found that the defendant was fully apprised of his rights, and the court's finding has not been contested on appeal. The trial court also found that the defendant voluntarily agreed to talk to the police officers. The court of appeals reversed, holding that because the defendant was not advised that he was a suspect in the Santiago homicide, the waiver of his Miranda rights was invalid. The court relied on People v. Spring, 621 P.2d at 965. In Spring, agents of the Federal Bureau of Alcohol, Tobacco and Firearms arrested Spring in Kansas City, Missouri on charges of firearms violations. Prior to arresting Spring, the agents learned from an informant that Spring had admitted participating in a homicide in Colorado. The agents initially questioned Spring on the firearms charges but then asked him whether he had a criminal record. Spring said that he shot his aunt when he was ten years old and that he had a juvenile murder record. Asked if he had ever shot anyone else, Spring said "I shot another guy once." Upon further questioning, Spring denied ever having killed a man in Colorado.

When Spring was subsequently charged in the Colorado homicide, he moved to suppress his responses to the questions unrelated to the firearms charges. The trial court denied the

motion, but the court of appeals reversed. The court held that the failure of the agents to inform Spring that he would be questioned about the Colorado homicide rendered the waiver of his Miranda rights invalid as to the questioning about the homicide.

We granted certiorari and affirmed the decision of the court of appeals to suppress the statements. However, we rejected the absolute rule adopted by the court of appeals, holding that "[w]hether, and to what extent, a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is simply one factor in the court's evaluation of the total circumstances, although it may be a major or even a determinative factor in some situations." People v. Spring, Nos. 83SC145 & 83SC155, slip. op at 14 (Colo. Dec. 2, 1985) (citations omitted). We noted that a suspect's awareness of the subject matter of the questioning may come from sources other than the interrogating officers. Under the facts in Spring, we concluded that the failure of the federal agents to inform Spring that part of the questioning would focus on the Colorado homicide and the absence of any basis upon which Spring could have reasonably suspected that he was being interrogated on that matter constituted a sufficient basis for holding the waiver invalid. We said:

> Spring had no reason to suspect that the federal agent who had just arrested him in Kansas City

> during a firearms transaction that allegedly violated federal law would question him about a murder that occurred in Colorado, a crime not only in a distant jurisdiction but also outside of the normal purview of the federal Bureau of Alcohol, Tobacco and Firearms and totally unrelated to the transaction that gave rise to the arrest and interrogation.

Slip op. at 18.

The court of appeals in Spring and in this case erroneously concluded that since the defendant was not told at the time he waived his Miranda rights that the interview would include questions about the homicide under investigation, the waiver was necessarily invalid. As we said in Spring, the applicable standard for determining the validity of the waiver is whether, in view of the totality of the circumstances, the waiver was voluntary, knowing, and intelligent. No single factor is determinative.

The defendant here reported to the Manchester police that his car had been stolen. In their investigation, the police learned that the car had previously been reported stolen and that its owner was the victim of a homicide. The police naturally desired to question the defendant about his claim of ownership to the vehicle and the circumstances surrounding his possession of the vehicle. The defendant was informed that the police wanted to clear up the confusion about the stolen car, and the defendant's acquisition and use of the car was in fact the subject of the interview. When the defendant's first account of his travels did not clarify the information known to

the police, they told the defendant that an Angel Santiago had been killed and that the defendant was using a credit card bearing that name. The defendant then gave a second version of his travels in which he stated he acquired the car from "George" while hitchhiking in Utah.

This is unlike the factual scenario in Spring. The federal agents in Spring began questioning the defendant about firearms charges and then asked about an unrelated homicide. In this case, the Manchester police questioned the defendant about his claim that his car was stolen and that he was Angel Santiago. Questioning about the car necessarily involved the subject of the Santiago homicide, which was part of the same criminal episode involving possession of a stolen automobile owned by Angel Santiago. While the defendant in Spring had no reason to believe that the federal agents who questioned him about federal charges would also inquire about a Colorado homicide, the defendant here could have reasonably expected to be asked about the circumstances surrounding his ownership and possession of the car he had reported stolen. In our view, the defendant was adequately advised of the subject matter of the interview at the time he waived his Miranda rights.

An examination of the other circumstances surrounding the interview demonstrates that the defendant voluntarily, knowingly, and intelligently waived his constitutional rights. Before the interview the defendant was calm and friendly. He

was not threatened or coerced. After being advised of his rights, the defendant said that he understood his rights and was willing to talk to the police. The record contains ample evidence that the defendant was sufficiently intelligent to understand the nature of his rights and the consequences of waiving them. We therefore conclude that the defendant's waiver of his rights was voluntary, knowing, and intelligent.

C.

We turn finally to the trial court's findings that the defendant's statements were voluntary. We will not disturb a trial court's findings of fact on voluntariness if the findings are supported by adequate evidence in the record. People v. Pierson, 670 P.2d at 770. Here, there is no evidence that the statements were obtained through promises, threats, violence, or any other improper influence. People v. Cummings, 706 P.2d 766 (Colo. 1985). On the contrary, the record reveals that the defendant spoke to the officers freely and without reservation.

Accordingly, the court of appeals erred in ordering suppression of the statements made by the defendant to the Manchester police. The statements were voluntary and were made only after a proper Miranda advisement and waiver.

II.

At the close of evidence the defendant requested that the trial court instruct the jury on second-degree murder. The court rejected the tendered instruction and submitted the case

to the jury on first-degree murder and aggravated robbery. The court of appeals reversed, declaring that "[a]lthough the evidence in this case indicates that there was little validity to defendant's contentions which would reduce his degree of culpability in the homicide, the [trial] court, nevertheless, had a duty to instruct the jury on this lesser offense." 677 P.2d at 385. The prosecution asserts that the trial court properly refused the instruction on second-degree murder because there was no evidence to support the instruction. We agree.

In a homicide case, a defendant is entitled to an instruction on a lesser included offense if there is any evidence, however slight, to establish the lesser included offense. People v. Shaw, 646 P.2d 375 (Colo. 1982); Coston v. People, 633 P.2d 470 (1981). Even if the evidence offered on behalf of the defendant is unpersuasive, the trial court is under a duty to instruct on the lesser offense. Id. However, where there is no evidence to support the instruction, refusal to instruct on the lesser offense is not error. Coston, 633 P.2d at 470.

Section 18-3-103(1)(a), 8 C.R.S. (1978), provides that a person commits the crime of second-degree murder if "[h]e causes the death of a person knowingly, but not after deliberation." Id. The defendant did not present any evidence at trial which would permit the jury to find that he caused the

death of Angel Santiago knowingly but not after deliberation, and we find none in the record.[5] The defendant's theory of defense was that he did not commit the homicide.[6] Because there is no evidence in the record to support the second-degree murder instruction tendered by the defendant, the trial court properly denied the instruction.

III.

The court of appeals also held that the trial court erred in failing to sequester the jury. The prosecution contends that although the jury should have been sequestered under Crim. P. 24(f), the defendant waived the requirement and has failed to establish any prejudice resulting from the trial court's failure to sequester the jury. We agree.

At the time of trial, Crim. P. 24(f) provided:

> (f) Custody of Jury
> In noncapital cases jurors may be permitted to separate during all trial recesses after cautionary instructions by the court as to their conduct. After the case has been submitted to the jury for deliberation, and they have not been able to arrive at a verdict at a reasonable evening hour, they may be permitted to return to their homes to resume deliberations the next day at an hour appointed by the court. Continuous custody of the jury by the bailiff in noncapital cases shall only be upon express order of the court for good cause. In capital cases, however, jurors shall remain in the bailiff's custody during all recesses from the time the jury is selected until discharged by the court.

Id. (emphasis added). A first-degree murder case is a capital case for purposes of Crim. P. 24(f). People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983); Tribe v. District

Court, 197 Colo. 433, 593 P.2d 1369 (1979). Rule 24(f), therefore, requires sequestration of the jury in a first-degree murder case, unless the requirement is waived by the defendant. Tribe v. District Court, 192 Colo. at 433, 593 P.2d at 1369; Segura v. People, 159 Colo. 371, 412 P.2d 227 (1966).

The court of appeals did not consider whether the defendant waived sequestration of the jury, stating only that Faulk, 667 P.2d at 1384, was "dispositive" of the sequestration issue. In Faulk, a first-degree murder case, both the defendant and the district attorney requested that the jury be sequestered. The trial court denied the request on the ground that sequestration was unnecessary because the jury was not death qualified. Relying on Tribe v. District Court, 197 Colo. at 433, 593 P.2d at 1369, we held that Crim. P. 24(f) requires sequestration of the jury in a first-degree murder case, regardless of whether the prosecution intends to qualify the jury for consideration of the death penalty or to seek the death penalty in the event of conviction. However, we explicitly recognized, as we had in Tribe, that a defendant may waive sequestration. We had no occasion in Faulk or Tribe to address the waiver issue because the defendants in both cases moved to sequester the jury.

By contrast, the defendant here did not request sequestration, did not object to the trial court's decision to allow separation, and did not complain when the jury separated on a number of occasions. The first time the defendant raised

the issue of sequestration was in his motion for a new trial. We are thus squarely confronted with the question of whether the defendant's silent acquiescence to the separation of the jury constituted a waiver of the sequestration requirement.

In Segura v. People, 159 Colo. at 371, 412 P.2d at 227, a first-degree murder case, defense counsel agreed with the prosecutor that sequestration of the jury was unnecessary. The trial court permitted separation after giving admonitory instructions to the jury. The defendant was convicted. On appeal, he contended that the requirement of sequestration in capital cases could not be waived. We held that "where defense counsel expressly agrees to separation of the jury in a capital case, error cannot be predicated on that procedure in the absence of a showing of prejudice to the defendant." Id. at 377, 412 P.2d at 231.

Unlike the defendant in Segura, the defendant here did not expressly consent to separation of the jury. However, we believe that the defendant's failure to object to the separation during trial constituted a waiver of sequestration. The majority of courts hold that sequestration may be waived by reason of the defendant's failure to make a timely request or objection. See, e.g., State v. Magwood, 290 Md. 615, 432 A.2d 446 (1981); Walters v. State, 554 P.2d 862 (Okla. Crim. App. 1976); Jackson v. State, 229 Ga. 191, 190 S.E.2d 530 (1972), vacated on other grounds, 409 U.S. 1122 (1973); Flannery v.

Commonwealth, 443 S.W.2d 638 (Ky. 1969); Annot., 72 A.L.R.3d 131, 180-186 (1976). The rationale underlying these cases is that a defendant should not be permitted to remain silent at trial while the jury is allowed to separate and then object to separation for the first time in his motion for a new trial. We agree with the rationale and hold that in the absence of a timely objection the failure to sequester the jury in a capital case is not reversible error unless the defendant establishes prejudice arising out of the separation of the jury.

Here, the trial court found, after a lengthy hearing on the defendant's motion for a new trial, that the defendant was not prejudiced by the separation of the jury. We will not disturb the trial court's finding since it is supported by adequate evidence in the record. It therefore follows that the trial court's failure to sequester the jury does not constitute reversible error.

IV.

On the morning of trial, the defendant moved for dismissal of the charges on the ground that he had been denied a speedy trial. The trial court denied the motion. The court of appeals affirmed.

The defendant entered pleas of not guilty to first-degree murder and aggravated robbery on March 3, 1980. A jury trial was set for July 28, 1980. On July 3, 1980, the defendant's attorney filed a motion to suspend proceedings pending a

competency examination of the defendant at the Colorado State Hospital. The trial court denied the motion. The same day defendant successfully petitioned this court for a rule to show cause and a stay of pending proceedings. On September 29, 1980, we made the rule absolute and returned the case to the trial court with directions to order a competency examination. Jones v. District Court, 617 P.2d 803 (Colo. 1980). The trial court thereupon ordered the defendant taken to the Colorado State Hospital for examination. On November 6, 1980, the psychiatric report was filed in the trial court. The first day after receipt of the report that defense counsel could be present in court was November 14. On that date, the trial court determined that the defendant was competent to proceed. Trial was set for and in fact commenced on January 12, 1981.

A criminal defendant must be brought to trial within six months from the date he enters a plea of not guilty. § 16-1-405, 8 C.R.S. (1978 & 1985 Supp.); Crim. P. 48(b). Failure to comply with the speedy trial statute requires dismissal of the charges against the defendant. People v. Bell, 669 P.2d 1381 (Colo. 1983); Harrington v. District Court, 192 Colo. 351, 559 P.2d 225 (1977). However, certain periods of time are not included in the computation of the six month period. Two exclusions are pertinent here:

> (6)(b) The period of delay caused by an interlocutory appeal whether commenced by the defendant or by the prosecution;
>
> . . . .

(f) The period of any delay caused at the instance of the defendant.

§§ 18-1-405(6)(b) & (f).

The defendant concedes that the eighty-nine day period between July 3 and September 30 must be excluded from the speedy trial computation as a "period of delay caused by an interlocutory appeal." § 18-1-405(6)(b); see People v. Ferguson, 653 P.2d 725 (Colo. 1982) (original proceeding initiated in good faith by either the defense or the prosecution constitutes an "interlocutory appeal" for purposes of the speedy trial statute). However, the defendant asserts that the period between October 1 and November 14 cannot be excluded. We disagree.

In our view, the thirty-seven day period between October 1 and November 6 was a period of delay "caused at the instance of the defendant." § 18-1-405(6)(f). We stated in People v. Bell, 669 P.2d 1381 (Colo. 1983), that "[t]he key to interpreting category (6)(f) is to determine whether the defendant caused the delay. If the delay is caused by, agreed to, or created at the instance of the defendant, it will be excluded from the speedy-trial calculation made by the court." Id. at 1384. See also People v. Murphy, 183 Colo. 106, 515 P.2d 107 (1973) (in making speedy trial determination, delays at the request of or for the benefit of the defendant are chargeable to the defendant). Here, the competency examination was requested by defense counsel for the benefit of the

defendant. The time necessary to complete the examination was thus properly chargeable to the defendant. See ABA Standards for Criminal Justice (1982) § 12-2.3(a) (period of delay resulting from examination and hearing on defendant's competency should be excluded from speedy trial computation).

We also believe the eight-day delay between the receipt of the psychiatric report on November 6 and the competency hearing on November 14 was attributable to the defendant. November 14 was the first day after receipt of the report that the defendant's attorney could be present in court. Scheduling delays to accommodate defense counsel are chargeable to the defendant. People v. Bell, 669 P.2d at 1381.

In view of the foregoing analysis, the defendant was not denied his right to a speedy trial. The defendant entered pleas of not guilty on March 3, 1980. Therefore, the original speedy trial deadline was September 3. Adding to that date the eighty-nine day delay occasioned by the original proceeding, the thirty-seven day delay necessary for the competency examination, and the eight-day scheduling delay to accommodate defense counsel, the new speedy trial deadline was January 15, 1981. The defendant's trial began on January 12, 1981.

V.

The judgment of the court of appeals is reversed, and the case is remanded to the court of appeals with directions to reinstate the judgment of conviction against the defendant.

1
§ 18-3-102, 8 C.R.S. (1978).

2
§ 18-4-302, 8 C.R.S. (1978).

3
Both the prosecution and the defendant filed petitions for certiorari. We granted both petitions, and the two cases were consolidated for purposes of this opinion.

4
Specifically, the trial court found:

> [T]he evidence clearly indicates that the defendant was fully apprised of his rights, that the focus of the investigation had not centered upon the defendant, and that as a matter of fact, since the very beginning of the transaction, the night before when the defendant had approached the officer voluntarily to tell the officer that his automobile had been stolen and that he was reasonably sure that whoever stole it wasn't going to bring it back, and he had been deprived of his trousers and wallet and other indicia of identification. The reference to the registration card indicated that the defendant was utilizing the name of Santiago, and there was also an indication there that he had employed a VISA card, so when they started looking for the automobile, they found out that it was involved in some criminal activity, possibly theft, and possibly homicide, but the officers were faced with a situation in which they were trying to apprehend the thief of the defendant's car and trying to get all of the information they could about the car, and in the process of doing so, they discovered that it was on the National Identification Computer, and that there was some criminal involvement other than that disclosed by theft; in the interrogation, the first story that he gave was inconsistent with the one that he gave secondly when they discovered or told him that they did not think that he was Santiago, and what was his name, and he gave them another statement and another name, and he did all of this voluntarily. Now, there was no probable cause to arrest, and there was no arrest which occurred prior to the time that the defendant admitted that he was an escapee from the Alabama

> institution. At that time, he became amenable to arrest for that charge, and he was booked by the New Hampshire Police Department on that charge. He was not charged with a homicide, and there was no probable cause to arrest for homicide, and there was no probable cause to arrest for thievery in the light of the stories related to the police officers by the defendant. Those are the findings of fact that will be attributed specifically to the order of the court overruling the motions contained in the motion to suppress statements in number one.

5
> Indeed, the defendant did not call any witnesses and did not present any evidence at trial.

6
> Although the defendant did not present any evidence at trial, his theory of the case may be gleaned from his cross-examination of prosecution witnesses. Additionally, the following colloquy took place between the defendant and the trial court at the close of the prosecution's case:
>
> THE COURT: Your only defense is that you are not guilty; that you didn't do it.
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: That is what you have stated is your defense. The People have charged in the information alleging a robbery and murder and you have denied that you participated in either one of them.
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: That is your defense?
>
> THE DEFENDANT: Yes, your Honor.

7
Crim. P. 24(f) has since been amended (effective January 1, 1984). The new rule provides:

> (f) Custody of Jury.

(1) In all cases, in the court's discretion, jurors may be sequestered or permitted to separate during all trial recesses, both before and after the case has been submitted to the jury for deliberation. Cautionary instructions as to their conduct during all recesses shall be give to the jurors by the court.

(2) The jurors shall be in the custody of the bailiff whenever they are deliberating and at any other time as ordered by the court.

(3) If the jurors are permitted to separate during any recess of the court, the court shall order them to return at a day and hour appointed by the court for the purpose of continuing the trial, or for resuming their deliberations if the case has been submitted to the jury.

No. 85-1517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF COLORADO,

Petitioner,

v.

JOHN LEROY SPRING,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF AMICI CURIAE OF THE STATE OF CALIFORNIA AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE LEGAL FOUNDATION OF AMERICA, AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONER

(See inside front cover for list of counsel.)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. The State of California does not need consent to file this brief. Consent to file for other *amici* has been granted by counsel for both parties. Letters of Consent have been filed with the Clerk of this Court.

INTEREST OF AMICI

The STATE OF CALIFORNIA appears by its Attorney General who is the chief law enforcement officer of the State.

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-four times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 67 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

Amici's specific interest in this case arises from our concern that this Court's approval of the decision of the Supreme Court of Colorado would place an intolerable burden upon the police engaged in lawful questioning of suspects of crime, a burden not required by the federal Constitution or *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

ARGUMENT

A VALID WAIVER OF THE RIGHT TO SILENCE AND RIGHT TO COUNSEL DOES NOT REQUIRE THAT THE DEFENDANT BE AWARE, PRIOR TO INTERROGATION, OF ALL POSSIBLE SUBJECTS OF INTERROGATION.

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *National District Attorneys Association, the International Association of Chiefs of Police,* various other associations of chiefs of police and sheriffs, and the *Legal Foundation of America.* Many of those briefs have often presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief essentially to the law enforcement impact of the issues raised by the parties.

The majority of the court below held, *inter alia,* that where the defendant, in custody of federal Bureau of Alcohol, Tobacco and Firearms agents, was given *Miranda* warnings and executed a waiver of rights without being informed that he would be questioned about an unrelated homicide in addition to federal firearms charges for which he had been arrested, there was not a voluntary, knowing and intelligent waiver of *Miranda* rights as to questions regarding the homicide.

The court's ruling overlooks the fundamental *reason* and *purpose* of *Miranda:* to protect a suspect's Fifth Amendment privilege against self-incrimination. That fact was made abundantly clear in this Court's very recent holding in *Moran v. Burbine,* ___ U.S. ___, 106 S.Ct. 1135 (1986), that the police were under no duty to advise a suspect that an attorney

secured by his relatives was available to him prior to interrogation. The Court stated:

> No doubt, the additional information would have been useful to the respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his *self-interest* in deciding whether to speak or stand by his rights. . . . Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. (emphasis added)

___ U.S. ___, 106 S.Ct. at 1142.

Amici believe that a concern for a defendant's *self-interest* may be what is at the heart of the decision below in *People v. Spring,* 713 P.2d 865 (Colo. 1985). The Colorado court majority may have confused constitutional rights with the broader concept of what is in a suspect's best self-interest; or, perhaps, it had in mind that we should return to a long-since discredited and discarded "sporting theory" of criminal justice. The fallacy of the "sporting theory" of criminal justice—the idea that a criminal suspect, like hunted prey, must have a "fair chance" to escape—has long been exposed by eminent legal scholars such as Wigmore, Pound, and as far back as Bentham. Wigmore, 1A EVIDENCE IN TRIALS AT COMMON LAW, § 57, at 1185 (3d ed. 1940); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 29 A. B. A. Rep. 395, 404-05 (1906); Bentham, 5 RATIONALE OF JUDICIAL EVIDENCE 238 (1827).

Amici respectfully submit that this Court, having laid to rest "self-interest" as the basis for the *Miranda* rule in *Burbine,* should unhesitatingly reject any notion of a return to a "sporting theory" of criminal justice, however much the defendant and his supporters in the instant case may long for such idyllic days. The investigation of crime by the interrogation process is not a game; it is a serious undertaking and is essential to the

continued existence of society. This is especially so in a case such as the present one in which the defendant was a seasoned veteran in the working of the criminal justice system. He was not a helpless "fox." He was, in fact, more like one of "equals, meeting in battle," an expression used by Fortas in *The Fifth Amendment: Nemo Tenetur Scipsum Prodere*, 25 J. CLEVE. B. A. 91, 98 (1954). For the defendant, unembellished *Miranda* warnings were quite sufficient, even to satisfy his "self-interest."[1]

Amici further urge this Court to consider the absurd practicalities that would result from adoption of the rule laid down by the court below. Suppose, for instance, the police have probable cause to arrest a person for a murder. They also have reasonable suspicion that he has committed seven other murders. He is advised of his *Miranda* rights regarding the murder for which he has been arrested. He waives his rights and makes admissions. Questionning drifts into the subject of a second murder. Must the police stop and repeat the *Miranda* warnings, adding an explicit statement that now a different murder is the focus of their inquiry? When the questionning moves to the third murder, must they do the same? And the same for the fourth, fifth, sixth, seventh and eighth?

[1] *Amici* note that the police in this case gratuitously added the further warning that if Spring decided to answer questions without the assistance of counsel, he had the right to stop the questioning at any time or to stop the questioning until the presence of an attorney could be secured. While the court below conceded that this particular embellishment was not "required" by *Miranda*, it stated, "we commend and encourage" it. *People v. Spring*, 713 P.2d 865, 871, n. 4. *Amici* urge the opposite view. This gratuitous embellishment is not only unnecessary, but encourages the "sporting theory" of criminal justice. *See* Inbau, *Over-Reaction—The Mischief of Miranda v. Arizona*, 18 The Prosecutor 7, 9 (Winter 1985). The embellishment urged by the court below with respect to warning a suspect about other crimes is equally unnecessary and undesirable.

Amici know from our experience and observations that frequently a person may be suspected of several crimes, in addition to the crime for which he has been arrested. Also, as interrogation begins, crimes not even previously suspected by the police may be suggested by the defendant's initial responses. Are the police required to assemble an accurate, exhaustive catalogue of all *possible* crimes they may wish to question the suspect about and present the list to the suspect for his thoughtful consideration? The rule adopted by the court below makes these caricatures entirely possible. It further undermines this Court's attempt to give bright line guidance to the police in criminal justice matters. *See New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981); *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157 (1982).

We submit that the correct analysis of this issue was undertaken by Justice Erickson in his thoughtful and scholarly dissenting opinion in this case. We will not duplicate petitioner's discussion of the cases cited by Justice Erickson, including supporting authorities such as LaFave and Israel, Criminal Procedure 306 (1985). The correct application of the constitutional principles involved in this case are well stated in Justice Erickson's summary:

> Law enforcement officers have no duty under *Miranda* to inform a person in custody of all charges being investigated prior to questioning him. . . . All that *Miranda* requires is that the suspect be advised that he has the right to remain silent, that anything he says can and will be used against him in court, that he has the right to consult with a lawyer and to have the lawyer present during interrogation, and that if he cannot afford a lawyer one will be appointed to represent him.

713 P.2d at 880.

CONCLUSION

The case before this Court is one of many hundreds that have been spawned by *Miranda*. They have consumed enormous time, effort, and expenditure of funds that could have been put to far better use on matters of considerably greater importance within the judicial system.

Not only is it in the best public interest to reject the rule established below in this case, but we recommend, additionally, that at the earliest opportunity this Court should re-examine the *Miranda* mandate as to the justification for its continued existence.

Respectfully submitted,

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Certiorari granted May 5, 1986

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INDEX

DOCKET ENTRIES

May	29, 1979	Information filed.
October	15, 1979	Amended Information filed.
December	6, 1979	Second Amended Information filed.
January	23, 1980	Motion to Suppress filed.
March	17, 1980	Hearing on Motion To Suppress.
April	4, 1980	Order Denying Motion To Suppress.
April	28, 1980	Trial To Jury Commences.
May	3, 1980	Jury Returns Verdict of Guilty.
June	2, 1980	Motion for New Trial filed.
June	25, 1980	Motion for New Trial denied. Entry of Judgment of Conviction. Defendant sentenced and Mittimus issued.

(f. 1) IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF MOFFAT AND STATE OF COLORADO

Criminal Action Number 79CR40

PEOPLE OF THE STATE OF COLORADO

PLAINTIFF,

vs.

DONALD PAUL WAGNER

and

JOHN LEROY SPRING,

DEFENDANTS.

TRANSCRIPT OF PROCEEDINGS

[The transcript has been edited, as per agreement of counsel, to include only portions relevant to *Colorado v. Spring*, 85-1517]

This matter came on regularly for hearing to the Court at the hour of 10:00 a.m., on Monday, the 17th day of March, 1980, at the Moffat County Courthouse, Craig, Colorado, before the HONORABLE Claus J. Hume, Judge of the District Court. [The transcript has been edited, as

(f. 2) The Court: The Court will be in session. The record should reflect the matter before the Court at this time is Moffat County Criminal Action Number 79CR40 involving the People of the State of Colorado against John Leroy Spring. The record should reflect Mr. Spring is personally present in Court with his Attorney, Mr. Bratfisch. Mr. Bratfisch is also accompanied by co-counsel this morning and I'm sorry I don't — Michael Gallagher, your Honor — Michael Gallagher, thank you; the People are represented by Mr. Carroll E. Multz, District Attorney and by Mr. Saba of the District Attorney's Office. The matter is set this morning for hearing on various motions.

• • •

(f. 18) Mr. Saba: Your Honor, the People will call as their first witness Mr. Harold D. Wactor, III.

(f. 19) By The Court: Mr. Wactor, if you would step right around here and raise your right hand, please. Do you solemnly swear the testimony you are about to give in the Cause before the Court should be the truth, the whole truth, and nothing but the truth, so help you God.

Mr. Wactor: I do.

The Court: Be seated.

Mr. Saba: Will you please state your name and business address for the record?

Mr. Wactor: Harold N. Wactor, III, Bureau of Alcohol, Tobacco and Firearms, 1150 Grand Avenue, Kansas City, Missouri, 64106.

(f. 20) Mr. Saba: Mr. Wactor, what is your main profession or occupation?

A. My job title is Special Agent. I am a criminal investigator with the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms.

Q. And how long have you been so employed?

A. Approximately 3 and ½ years.

Q. Okay, and what training, if any, have you received in that position?

A. For that position, specifically, I have attended the Federal Criminal Investigators Course, the Bureau of Alcohol, Tobacco and Firearms New Agent Training Course, and other seminars and short courses.

(f. 21) Q. Would you please relate to the Court, uh, briefly, what your general duties are as an ATF Agent?

A. I'm a criminal investigator. We enforce the Federal laws with regard to firearms, explosives, alcohol and tobacco.

Q. Okay, Agent Wactor, did there come a time that you had the occasion to investigate a person by the name of John Spring?

A. Yes.

Q. Okay, and under what circumstances?

(f. 22) A. Mr. Spring came about as part of an investigation that I initiated during February of 1979. At that time I received information that George Dennison and others including Mr. Spring had been involved in the burglary or theft of firearms, that they planned to steal firearms, transport them interstate and sell them.

Q. Okay, and what was the source of that information?

A. The initial source of information was Susan Dennison, wife of George Dennison.

Q. Okay, and did you obtain any information from George Dennison himself?

A. Yes, I did.

(f. 23) Q. And what was the nature of that?

A. Because of Bureau policy, we could not use Susan Dennison as an informant. We began to work on George Dennison and George became an informant for the Bureau of Alcohol, Tobacco and Firearms.

Q. Okay, was Mr. Dennison in contact with Mr. Spring at this time?

A. Yes, he was in telephone contact with Mr. Spring, who I was led to believe was in Iowa at the present time— at that time.

Q. Okay, and during what approximate dates did these telephone conversations take place?

(f. 24) A. Telephone conversations that I was privy to through recording - uh - started March 21st, 1979, and went up to and included March 29th, 1979.

Q. Okay, and how was your investigation related to this series of telephone conversations?

A. I had information that Mr. Spring was a convicted felon— that he had committed thefts or burglaries to obtain firearms, and that with or through Mr. Dennison that he had sold these firearms.

(f. 25) Q. Then, what was the source of your information at that point in time that Mr. Spring was a convicted felon?

A. Contact with the Sheriffs in Iowa -uh- Bud Erwin and Ron Tucker, and conversations with the Anamotia (phonetic) Men's Reformatory in Iowa.

Q. Okay, based on that information and based on the information in the telephone conversations, uh, what further steps did you take in your investigation?

A. On March 28th, Mr. Dennison received a telephone call from Becky Spring, who is identified as the wife of John Spring. She stated that the day before, March 27th, John had obtained a large quantity of firearms and that he was desirous of selling these firearms. I contacted Sheriff (f. 26) Erwin up in Otumwa (phonetic) Iowa, and he informed me—that—this was on March 29th, I talked with Sheriff Erwin and he informed me that on March the 27th there had been a residential burglary in the County, which a—approximately 30 some firearms had been taken. There were two telephone calls on the night of March 29th between John and Becky Spring and George Dennison, at which point John stated that he had a bunch of firearms. He described some of the firearms, which matched the information I had from Sheriff Erwin. He stated that he would be up at 1:30 in the afternoon the next day, March the 30th, Friday.

Q. Did you take any steps to recover those particular firearms that you were informed about?

(f. 27) A. Yes, we did. Uh, we were set up for an undercover buy on—at 1:30 March the 30th in the K-Mart parking lot Vivian and Antioch Roads, Kansas City, Missouri. Prior to this George Dennison contacted me, described a green duster that -uh- Mr. Spring and a Robert Beam were riding in, stated that he knew both Spring and Beam, that he had been incarcerated at the Anamosa Men's Reformatory with them. He stated that he saw a large quantity of firearms and that there were approximately

14 firearms for sale that were contained (f. 28) in this vehicle. We established a surveilance at the K-Mart parking lot. Two undercover agents, Virgil Walker and Pat Kelly were awaiting the arrival of Mr. Spring and Mr. Beam at the K-Mart parking lot. Mr. Dennison arrived, contacted both our undercover agents, and Mr. Spring and Mr. Beam who were located in different parts of the parking lot.

Q. Okay, at that point in time, what crimes did you suspect Mr. Spring of?

A. Being a convicted felon, we had probable cause to believe that he was in violation of the appendix of Title 18 of the United States Code, which prohibits (f. 29) felons and other persons from possessing firearms subsequent to their conviction. We had reason to believe—we knew that these firearms had been stolen in Iowa and that they had been transported to Missouri by Mr. Beam and Mr. Spring. We have two separate offenses there—a felon causing a firearm to be transported in interstate commerce and later it was determined the bartering, sale of stolen firearms, which had -uh- which had moved as a part of interstate commerce. There is also the crime of dealing in firearms without a license.

Q. Okay, Sir, could you please -uh- describe the events that transpired then on the afternoon of March (f. 30) 30th, 1979 at approximately 1:30 in the K-Mart parking lot in Kansas City?

A. Mr. Beam and Mr. Spring drove to the parking—uh, the area of the parking lot—

Mr. Bratfisch: I object, your Honor—on foundation—I don't think it has been established that this witness was there or not.

By The Court: Objection sustained.

(f. 31) Mr. Saba: Q. Okay, Mr. Wactor, would you please indicate where you were on the afternoon of March 30th, 1979?

A. I was at the K-Mart parking lot—I was in direct observation of the vehicle bearing Mr. Beam and Mr. Spring prior to their meeting with our agents, and I was monitoring through electronic means our agents.

Q. Okay, was that the same surveilance that you testified to earlier?

A. Yes it is.

Q. Okay, Mr. Wactor, would you please relate to the Court the events that transpired on that occasion?

A. A vehicle bearing Mr. Dennison and another vehicle bearing Mr. Beam and Mr. Spring drove adjacent to the vehicle containing special agents Kelly and Walker. Mr. (f. 32) Dennison was dismissed on the pretense of being sent to get a six-pack of beer. At that point, Mr. Beam and Mr. Spring engaged in conversations and negotiated with agents Kelly and Walker for the sale of these firearms. After negotiations were completed, the two vehicles were moved because of the arrival of—of unidentified and uninvolved third parties. Mr. uh—the vehicle bearing Mr. Beam and Mr. Spring was moved to the South edge of the parking lot followed by the vehicle containing the Agents Walker and Kelly. The vehicles were put trunk to trunk so that the firearms could be transferred. After the trunk of the Duster bearing Mr. Beam and Mr. Spring (f. 33) were opened, then Mr. Beam and Mr. Spring were in the process of taking the firearms out of the trunk, they were arrested.

Q. Okay, and by whom were they arrested?

A. They were arrested by special Agents Walker and Kelly.

Q. Okay, and at that—that point, what if anything, did you do?

A. I was approximately 75 to 100 feet away (f. 34) observing the entire incident and I drove then with other agents that were on the covering team. We assisted in securing and searching Mr. Beam and Mr. Spring and collecting, tagging and removing the firearms that had been in the vehicle.

Q. What amounts, or numbers and types of firearms were in the vehicle, and which vehicle were they in?

A. They were in the green Duster—there were a total of 18 firearms on the person of Mr. Beam and Mr. Spring and in the vehicle. Of these, 14 rifles and shotguns had been—correction 13 rifles and shotguns and 1 handgun had been offered for sale.

Q. Were all those weapons in the vehicle that Mr. Spring had arrived at the parking lot in?

(f. 35) A. All of the—uh—yes, at one time or another they had all been in the vehicle.

• • •

(f. 38) By Mr. Saba: Q. Agent Wactor, when the arrest was made that you've just described, how did you know it was John Spring?

A. Initially we knew it was John Spring because of the eye witness identification of George Dennison. During the arrest and processing—uh—correction—during the con-

tact with the undercover agents, he was identified as John —they were identified as John and Bob.

Q. Excuse me, by whom?

A. By Dennison. Uh—last names were not given. Uh, after the arrest, the—both individuals were searched for identification and both individuals were asked what their identity was. And, it was determined that the (f. 39) individuals were Robert Beam and John Spring, as we had suspected.

Q. Do you recall whether or not the wallet that Mr. Spring contained any—uh—documents to indicate who he was?

A. Mr. Spring had on his person several pieces of identification, to include that of John Spring. He had other identification for at least two other persons, one of them being George Dennison.

(f. 40) Q. Okay, do you recall specifically whether or not Mr. Spring indicated that he was Mr. Spring to an agent?

A. Yes, Sir he did indicate that he was John Spring.

Q. Okay, and when did—did he do that?

A. At the parking lot and later at the office when he was being cross—uh, the Alcohol, Tobacco and Firearms Office, where he was being processed. He completed a questionaire in his own handwriting, which—uh—listed his name as John Spring, date of birth and other information about himself.

Q. Okay, Agent Wactor, do you know whether or not Mr. Spring was advised of his Constitutional Rights at the time of the arrest?

(f. 41) A. Mr. Spring w—and Mr. Beam were both advised of their rights, separately. Mr. Spring was in the custody of Agent John Malooly, and other Agents. I observed Agent Malooly with—uh—an Advise of Rights Card in his hand, uh beginning to read—uh—rights to Mr. Spring.

Q. And where was Mr. Spring at that time?

A. As I recall, he was in the back seat of one of our cars.

Q. Okay, and where were you at that time?

A. Uh, standing on—uh—on the pavement.

(f. 42) Q. Okay, and did you listen to the full advisement?

A. No, I did not.

Q. Okay, what portions, if any, did you hear?

A. The initial part.

Q. Okay, are you aware of what procedure Mr. Malooly was following when you were present?

A. Mr. Malooly appeared to be following the—a standard advice of rights procedure, for which we have uh, three separate, different forms, which all contain the same information, includes the advice of rights, and then a (f. 43) second portion, which includes the waiver of rights.

Q. Okay, can you testify whether or not you saw him utilize one of your standard Department of Treasury, Bureau of Alcohol, Tobacco and Firearms forms?

A. He appeared to have one of the two advice of rights cards in his hand.

Q. Okay, did he have it in his hand?

A. As I recall, yes.

• • •

(f. 51) Q. Agent Wactor, directing your attention back to the point and time of the arrest, were you aware of whether or not John Spring was at that time personally armed?

A. We had been appraised by Mr. Dennison that both Mr. Beam and Mr. Spring had firearms in their possession.

Q. And, are you aware of whether or not a firearm was removed from his possession?

(f. 52) A. Subsequent to the arrest an Astra .22 caliber revolver—uh, correction—.22 caliber pistol bearing serial number 99598 was removed from the coat pocket of Mr. Spring.

Q. Did you personally observe that weapon removed from his coat pocket?

A. The firearm was removed by Special Agent Malooly, and I arrived immediately after it was removed from the pocket, and advised by Agent Malooly that this had come from Mr. Spring's pocket.

Q. Okay, and where is that firearm now?

A. It's in my possession at the present time.

Q. Is the firearm disabled at the present time?

A. It is not disabled, it is a functioning firearm, it is not loaded.

(f. 53) Q. Okay, and is this the same firearm that was removed on March 30th, 1979 from Mr. Spring's possession?

A. Yes, it is.

Mr. Saba: Your Honor, at this time, the People would tender into evidence this firearm, just delivered to myself by Mr. Agent Wactor and marked People's Exhibit F.

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(f. 59) Q. (By Mr. Saba) Agent Wactor, do you know whether or not Mr. Spring was again advised of his rights on March 30th, 1979?

A. (By Agent Wactor) Uh, according to a report that I received from Special Agent Sedouski and an ATF form of—advice of rights and a waiver to his rights, Mr. Spring had been advised of his rights a second time; during processing at the offices of the Bureau of Alcohol, Tobacco and Firearms.

(f. 60) Q. Okay, are you aware of another occasion on which he was advised of his rights on March 30th, 1979?

A. At the bond hearing when Mr. Beam and Mr. Spring appeared before United States Magistrate Kelvin Hamilton, they were advised of their rights at that time.

Q. Were you personally present?

(f. 61) A. Yes, I was.

Q. Okay, and what details do you recall about that advisement?

A. It is a standard advisement that is given at all bail bond hearings that he has the right to counsel,—uh—that he has the right to remain silent, that if he cannot afford counsel that it be provided—or otherwise obtain counsel—be otherwise—it will be appointed for him, and that anything

that is said can be used against him. I do not recall the exact wording or the exact order of the admonition.

Q. Okay, did that advisement take place before or after the advisement that you have just indicated took place at the Bureau Office?

(f. 62) A. This was much later in the afternoon.

Q. Okay. Agent Wactor is the person that you knew on March 30th, 1979 as John Spring, the same person that you know by that name on this date?

A. Uh, yes Sir, this man seated at the table next to Mr. Bratfisch, uh, with the brown shirt.

Mr. Saba: Your Honor, may the record reflect that the witness has identified the Defendant?

By The Court: The record should so reflect.

Q. Okay, Agent Wactor, going back to the advisement of rights that took place at the Bureau office on March 30th, 1979—were you present at that advisement?

(f. 63) A. I was not.

Q. Okay. Are you personally aware of which Agent conducted that advisement?

A. Uh, yes, it was Agent Christopher Sadowski. S-a-d-o-w-s-k-i.

Q. Okay. Are you aware of whether or not a statement was taken from the Defendant John Spring, immediately succeeding that, or subsequent to that advisement?

(f. 64) A. I was advised that he was questioned at that time—um—I do not have a report as to exactly what

was discussed and I do not know what in total was discussed at that time.

Q. Okay, after March 30th, 1979, what was your next contact with John Spring?

A. Other than observing Mr. Spring at one of the Federal Court proceedings, the next time that I had occasion to speak directly with Mr. Spring was on July the 13th, 1979 at approximately 2:05 p.m. at the Jackson County Jail, Kansas City, Missouri.

Q. And, under what circumstances did that come about?

(f. 65) A. This was subsequent to Mr. Spring's guilty plea and sentencing. We had received information from Sheriff Tucker that one person who knew Spring—uh—Mr. Spring had advised that he might have some firearms and/or explosives in a pond located about the Clifflands area of Iowa. Agent Patterson and I then went to the Jackson County Jail to discuss this matter with Mr. Spring.

Q. Okay, do you recall whether or not John Spring was advised of his rights on that occasion?

A. Yes, he was.

Q. By whom?

(f. 66) A. Uh, I advised Mr. Spring of his rights on that occasion.

Q. Okay, would you please repeat to the Court the exact procedure that you adhere to?

A. After entry to the jail, waiting for Mr. Spring to be brought down, we went to an enclosed room, which was immediately off a larger room, uh, we sat down and I took

out a copy of—uh—ATF form for the written advice and waiver of rights. As is my procedure I handed Mr. Cop—Mr. Spring a copy after determining that he (f. 67) could read. I asked him to read along with me while I read his rights to him. I read the first part—the advice of rights, asked him if he had any questions, if there was anything that I could explain to him. Then, after receiving a negative reply that there was nothing to be explained, that he knew his rights, I asked him to sign the form indicating that he had in fact been advised of his rights. He declined to do so at this time. He indicated that he would speak to us. At that time I read the waiver of—the portion of the form. Again asked him if he had any questions, needed an explanation. He replied that he did not need an explanation, and I asked him to sign it. He again refused to sign the form. At that point I closed the clipboard and Agent Patterson and I stood up to leave. Uh, Mr. Spring verbally stopped (f. 68) us from leaving, he said words to the effect that he knew his rights, but he didn't want to sign anything, but he was willing to talk to us.

Q. Agent Wactor, I hand you what has been marked as People's Exhibit G, and ask you if you would examine the same.

A. Yes, Sir. People's Exhibit G is an ATF form 3200.4, uh, which is waiver of right to remain silent and of right to advice of counsel. It contains the English version on the front and the Spanish version on the other side. It was the English version that was uh, given to and read to Mr. Spring.

Q. Is that the identical advisement form that you used on July 13th, 1979?

(f. 69) A. Yes Sir, it is, uh.

Q. And are those the identical rights of which you advised Mr. Spring of on that date?

A. Yes, Sir, they were read verbatum (sic) as they are printed on this sheet here with additions made by me (f. 70) after each section inquiring as to whether he understood or, for the waiver part, would waive his rights.

Q. Can you state for a fact whether or not you advised him of each and every right on that document?

A. Yes, Sir.

Your Honor at this time the People would tender into evidence People's Exhibit G.

Mr. Bratfisch: No objection, your Honor.

Q. (By Mr. Saba) Agent Wactor, you indicated that you closed your clipboard and you got up to leave and that Mr. Spring expressed a willingness to talk to you. Did you at that time promise him anything?

(f. 71) A. No.

Q. Did you in—at that time threaten him in any manner?

A. No.

Q. Did you do—do or conduct any activity which would coerce him to talk to you?

A. No.

Q. Okay, and what happened at that point?

A. After that point, we resumed our seats, and after it was clear in my mind that he understood what his rights were and that he would talk to us, give up his rights, even though he wouldn't sign the form, then we began asking

(f. 72) him questions about his activities. The uh—among the—uh—his activities that we questioned him about were —uh—his activities in the Cliffland area, where he was supposed to have a cave where there were some firearms supposedly—allegedly stored.

Mr. Saba: Excuse me.

Mr. Wactor: Also, about a pond, which was in or near the Clifflands area which might contain additional firearms and/or explosives. Mr. Spring replied that (f. 73) there were no other firearms or explosives in the Clifflands area, or in the pond up in Iowa. He did—uh—relate to a pond that was in Missouri where we knew some firearms had been stolen, uh ww—where some firearms had been placed, but we had not recovered the firearms.

Q. Okay. Agent Wactor, did you ask him any questions about any poss—possible involvement Mr. Spring may have had in incidents that took place in Colorado?

A. Yes, I did.

Q. Okay, and do you recall what questions you asked him?

A. There was general conversation about his activities, at which time he related some of his activities (f. 74) in Colorado—uh, he indicated that he did not know any specific dates, that he had been in and out of Colorado several times between September of 1978 and uh February of 1979. In specific, we asked him about the uh death of a Mr. Walker.

Q. Okay, and would you relate to the Court precisely how you worded that question?

A. There were several questions asked which were not answered. I asked him in words to the effect, this is toward the end of the interview, "Is it safe to assume that you, Walker and Wagner went out together and that only you and Wagner came back alive?". At that point he replied (f. 75) "Yea", and he said—so—something to the effect if uh "you could say that", or something like that, and he grinned at that time.

Q. Did he indicate where this incident took place?

A. South of Craig, Colorado.

Q. Did he indicate at what approximate time of year it took place?

A. Yes, approximately during February of 1979.

(f. 76) Q. At this particular interview, did you ask Mr. Spring any questions about the .22 automatic that was previously entered into evidence as People's Exhibit G?

A. Agent Patterson asked him about several firearms, including a .22 caliber pistol, which had belonged to Mr. Walker, and Mr. Spring indicated—uh—that that was—the —that we had that pistol in custody, that we had taken it from him.

Q. Sorry, did I understand your testimony—did—Mr. Spring indicated that he had taken that particular pistol from Mr. Walker.

A. Uh, both. Uh, what I had said was that we had taken the pistol from him. He also stated that he had received that firearm from Mr. Walker.

(f. 77) Q. Okay, did he say when he received that firearm from Mr. Walker?

A. Uh, the—at approximately the time of uh his death.

By The Court: I think your question was asked in the terms of Exhibit G, Mr. Saba,—what you meant? The firearm that is admitted here has been labled (sic) Exhibit F—

Mr. Saba: Thank you, your Honor, if I might correct myself.

By Mr. Saba: Agent Wactor, all these questions that I have just asked you regarding Exhibit G—uh—(f. 78) pertaining to the firearm, if I informed you that it is actually Exhibit F, would your answers bear any substan—vary in any substantial degree or at all?

A. No, it would be the same.

Q. (By Mr. Saba) Okay, would you please indicate whether or not the, or with what specific—uh—description, what specifications the firearm was—um—(f. 79) identified to or described to, uh—Mr. Spring during that interview?

A. As I recall, it was described as a .22 caliber pistol. It belonged to Mr.—er—a .22 caliber firearm—it belonged to Mr. Walker.

Q. Okay, was there any further description on it?

A. Not as such.

Q. Do you recall whether or not Mr. Spring described the gun when he admitted—when he indicated to you that he had obtained that gun from Mr. Walker?

A. No, as I recall, uh, it was just uh referred to as a .22 caliber pistol, or a .22 caliber firearm at different times.

(f. 80) Q. Okay, Agent Wactor, after you asked him this question about who went out and who came back alive, did Mr. Spring relate anything else to you that was relevant to it?

A. During the course of the interview we asked him uh—exactly what did happen. He did relate that Mr. Walker had been talked into going down into a ravine and flushing some deer out, so that they could be shot—the deer could be shot. Uh, he also stated that prior to Mr. Walker's going down into the ravine that he had obtained the .22 caliber pistol from Mr. Walker.

(f. 81) Q. Okay, did he indicate whether or not these incidents were related to or contemporaneous taking place at about the same time as this incident where certain people went out and certain people came back alive?

A. Yes, uh the question about people com—going out and only two coming back alive, uh, uh, was ref—reference to the other uh other statements.

Q. Did Mr. Spring make any other statements to you at that time regarding any incidents that took place in Colorado?

(f. 82) A. No, I believe that—no those were the only statements he made concerning incidents in Colorado.

Q. Okay, and would you describe for—for Judge Hume Mr. Spring's demeanor during this interview?

A. Mr. Spring was dressed in jail clothing, his dress is slightly different than what it is today. He had, uh, longer hair, it was back in a pony-tail. He had a beard and a mustache at that time. It was in the afternoon of—he appeared to be relaxed and in certain uh, concerning certain

topics, he was talkative, uh concerning other topics, he was not talkative.

Q. How long did the interview last?

(f. 83) A. The interview lasted 50 minutes, although Agent Patterson and I were in the jail complex itself an hour and five minutes.

Q. Okay—

A. An hour and ten minutes, Excuse me.

Q. During the entire length of the interview, did you at anytime threaten Mr. Spring?

A. No, I did not.

Q. Did you at anytime promise him anything?

A. No, there were no promises made.

Q. Was he at anytime ever touched by any law enforcement agent?

(f. 84) A. No, he was not, uh we were seated on separate chairs, there was approximately a distance of 4 to 5 feet separating me and Mr. Spring and probably the same distance separating Mr. Spring and Agent Patterson.

Q. Was there anything abnormal about the physical environment?

A. Well, it was conducted—the interview was conducted inside a jail, it was a uh concrete or masonery structured building, rather austere. I don't recall (f. 85) the exact dimensions of the room. It appeared to be at least 10 foot by 10 foot square. There were at least three chairs in the room. There were no windows, no bars. Uh, it had two doors, both of which were closed at that time.

Q. Thank you Mr. Wactor. I have no further questions at this time, your Honor.

CROSS EXAMINATION

By Mr. Bratfisch:

Q. Agent Wactor, on July 13th, when you went into the jail to talk to Mr. Spring, who was with you that day?

A. Agent Joseph Patterson.

(f. 86) Q. Alright. Now from your testimony, it is your procedure to immediately identify yourselves? Is that correct?

A. We do, uh, identify ourselves. I did not state that. Yes, we did. He was identi—I identified myself to Mr. Spring using a pocket commission, which contains a badge on the outside and a commission car—two part commission card on the inside. I also asked Mr. Spring if he remembered us, and he indicated that he did.

Q. Alright, now was that the first order of business when you entered the room? Did anything happen before that?

(f. 87) A. Yes, we actually we'd met Mr. Spring in another room, which was a large, I'd have to describe it as a day room—contains several chairs and there were other inmates of the jail and their attorneys present. Uh, there was a short conversation in this room, and I don't recall as to whether I identified myself there at that time, or whether we went into the other room.

Q. Can you remember what was said at all in this conversation?

(f. 88) A. Uh, we'd like to talk to you and uh, can we go in this other room.

Q. Alright, anything else you can remember that was said?

A. No Sir.

Q. Okay, what's the first thing you can remember being said then when you entered the smaller room?

A. When we entered the smaller room, it was probably at that time that I displayed the entire commission book to Mr. Spring. We sat down and then he was—I believe again we probably told him that we wanted to talk to him, but before we could we had certain formalities that we had to go to, that I had to advise him of his rights, and then I went into the advice of rights form.

(f. 89) Q. Alright. So, the—the only two things that really happened before the advisement of rights were you identified yourselves and you told him that you wanted to talk to him?

A. That is correct.

Q. Alright. And at that point, you didn't talk about what you wanted to talk to him about, did you?

A. That is correct.

Q. Then, after you read the statement of rights as contained in People's Exhibit G, Mr. Spring, you stated, refused to sign it. Is that correct?

A. That is correct.

(f. 90) Q. Now, you've described for us the—I won't go through it, but as you attempted to leave, Mr. Spring

stopped you and said that he would talk to you anyway. Is that correct?

A. Yes, Sir.

Q. Okay. Now, I take it from that point on you never went through the business of re-reading him his rights, did you?

A. That is correct, I did not.

(f. 91) Q. Okay, or even—not even just reading him his rights. You just never brought up the question of rights again in that interview, did you?

A. After he informed us that he knew his rights, that he would talk to us, but he wouldn't sign anything, no, the rights were not discussed after that.

Q. Now, Agent Wactor, when and from whom did you first learn anything about a possible homicide here in Craig, Colorado?

A. The first information that we actually had about a homicide came from George and Susan Dennison. Uh, I do not recall exactly, I believe we were probably advised (f. 92) first by Susan Dennison. Then we were advised by George Dennison, that there—they had information that there had been a homicide committed in Craig, Colorado.

Q. Okay, and when did you receive this from them?

A. This was during March of 1979, and I do not recall the exact date.

Q. Alright. Now, when you went to talk to Mr. Spring on July 13th, the first order of business you brought up with him when you did agree to talk was the guns that maybe were hidden in a pond, right?

A. Yes Sir.

Q. And this was after Mr. Spring had been convicted and sentenced on the arrest for the firearms that (f. 93) you just described. Is that correct?

A. Yes that is correct.

Q. Agent Wactor, were you, at the time that you talked to John Spring on July 13th about these guns concerned about building another case against John Spring, or did you simply want to take care of getting these firearms confiscated by your agency?

A. Primary concern was retrieving the firearms and the explosives that uh—the uh—so that the firearms, if we could find a lawful owner on them that they could be (f. 94) returned and that the explosives could be rendered harmless.

Q. Alright. So the, your general interest at that point was, now that Mr. Spring had been convicted on an arrest, that you had been in on etc.—that you just sort of wanted to clear what unfinished business there was up before he was sent off to the Federal penitentiary?

A. That's right sir.

Q. Alright. And then that one thing on your mind was simply obtaining these guns and not have them sit there until 1985 or whenever Mr. Spring was going to be paroled. Is that correct?

(f. 95) A. That co—that is correct. He was—he also answered other questions about the firearms, uh, particularly firearms fences in the Kansas City area, and he was asked questions of other activities.

Q. So, but would it be fair to say that you had never told Mr. Spring that we are investigating possible future charges against you for possession or theft of other firearms. Isn't it true you never said anything like that?

A. That's correct.

Q. Alright. The general tone of the conversation was basically let's talk now and clear up whataver unfinished business we have, uh before you are sentenced. Would that be fair?

(f. 96) A. I'm sorry, would you repeat that again Sir?

Q. The general tone and tenor of your conversation at that point was let's talk—a waiver hasn't been signed here, but let's talk about what um—what other things can be cleared up for your benefit before Mr. Spring is sent to the Federal Penitentiary.

(f. 97) A. If you mean for—and—when you say for your benefit, if you mean for my benefit—yes sir.

Q. Agent Wactor, you testified that you felt in your own mind that John Spring understood his rights and had waived them orally, even though he hadn't signed that form. Is that correct?

A. That's correct.

Q. Did you also feel in your own mind that John Spring thought there was some difference between signing that form and not? In your own mind, did you think that he attributed some importance to the distinction he was making in his behavior?

A. Yes, I think he did.

(f. 98) Q. Now, Agent Wactor, isn't it also true that when you went to talk to John Spring on July 13th, 1979, you intended to ask him a few questions about this possible homicide in Craig, Colorado?

A. That is correct.

Q. Now Agent Wactor, did you make notes of that interview with John Spring on July 13th?

A. Notes were not made at the time of the interview. Handwritten notes were made at a later time.

Q. Alright. By yourself?

A. Yes. I made handwritten notes by myself and I was advised that—uh—Agent Patterson also made notes.

(f. 99) Q. Alright, and at a later time did you have those notes typed out?

A. No, I did not.

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(f. 100) Q. Now Agent Wactor, you testified that you took some handwritten notes right after this interview?

A. Not immediately after, it was uh it was on a short—short while that evening.

Q. The same day?

A. Yes sir.

Q. Alright. I'm going to hand you Defendant's—its been marked as Defendant's Exhibit 1 and ask you if you can identify this?

A. Uh, yes, this appears to be a photocopy of my notes. Yes sir.

Q. Those are the handwritten notes that we have (f. 101) been talking about, that you took after the July 13th interview with Mr. Spring?

A. Yes sir, a photocopy.

Q. Alright—your—due to the fact that that's a photocopy and not that good of one, and I can't read this Agent's handwriting too well and it's a page and half, I'd ask that he simply reads that into the record at this point.

By The Court: Alright.

Mr. Bratfisch: Go ahead, sir.

Mr. Wactor: 7/13/79—Excuse me, your Honor—an abbreviation or two in here—should I—do I—may I read what an abbreviation means?

(f. 102) By The Court: I think we are reading for content essentially, so probably just go ahead and read it without specifying abbreviations as such.

By Agent Wactor: Ruth Patterson 1345 to 1455 at jail, interviewed John Spring at 1405. Spring refused to sign waiver. I offered to leave. He said he would talk to us. Words to effect "I know my rights, but I don't want to sign anything". I have quotes around I know my rights, but I don't want to sign anything. Paragraph.

He was evasive, Answered several questions, quote "I'd (f. 103) rather not talk about that." (end of quote) (Paragraph) Admitted being in San Diego, reacted to Sheridan, but denied burglary or murder. Denied San Diego murder of cabby. Knowledge of Los Vegas fence or conservation officer. Evasive about Walker. Admitted he, Walker and

Wagner went out in the woods together. Would not talk about who shot Walker. I asked "Is it safe to assume you, Walker and Wagner went out together and only you and Wagner came back alive." Spring said "yea, something like that" and grinned. The back of the Page, Page 2:

He did say Walker went into a ravine to flush deer. Spring won't say who shot Walker—which is an error. He did admit to getting Walker's gun away from him before he went to flush deer out of the ravine. And my signature Agent Wactor (f. 104) on the back.

Q. (By Mr. Bratfisch) Okay, sir. You stated that your sentence "Spring won't say who shot Walker" was an error?

A. Yes sir. That's an error—should—uh should read wouldn't.

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(f. 106) Q. (By Mr. Bratfisch) Now from this statement, Agent Wactor, it appears that you had several other things on your mind that you wanted to clear up with Mr. Spring, didn't you?

A. That's right. We discussed several other things.

Q. Are all the things that you discussed contained in your notes, Defendant's Exhibit 1?

A. No, they're not.

Q. Would you tell us what other things you discussed?

A. We discussed the Clifflands (sic) area, which he (f. 107) replied that there were no firearms or explosives.

Uh, we discussed when and how he had sold firearms that he had obtained. Um—

Q. And, was he—was he willing to talk to you about the firearms?

A. Yes he was.

Q. Not much hesitation about that, was there?

A. No.

Q. What other things did you talk about?

A. Other than what's contained in the notes there—uh—I don't believe we discussed anything else.

Q. Okay. You brought up a uh—you say reacted to Sheridan. What was that about?

(f. 108) A. At the time that Mr. Spring may have been in California, there were a couple of homicides committed and a burglary, one of them being at a Sheridan, believe it was in San Diego and I cannot explain exactly what his reaction was—it was a physical reaction. As if he were startled. He, of course, denied any knowledge of—of any other killings and uh, knowing about any firearms that might have been used in any other homicides. He did admit to being in San Diego. Yes.

Q. Did he readily admit to being in San Diego?

A. Yes.

(f. 109) Q. Alright. And, did he have any particular hesitation or reservation about denying the Sheridan burglary or the possible homicide in San Diego, or anything like that?

A. No I don't—other than the physical reaction that —uh—that I observed, and I can't describe it—uh—

Q. Was it basically that you just off base—I mean you know—I don't know anything about this to tell you, that you were off base—in asking him about it—

A. If I were to interpret his reaction, it was one of surprise.

Q. Okay. (By Mr. Bratfisch)

A. And then (By Agent Wactor)

Q. And then he denied any involvement, is the correct?

(f. 110) A. Yes, he did.

Q. Alright. And, he didn't say before he denied I don't want to talk about it—he just denied it. Is that true?

A. That is correct.

Q. And the same thing would go for knowledge of a Los Vegas fence or something about a conservation officer? He readily denied knowledge about that, is that correct?

A. Yes. No, excuse me, I'm in error there. He denied knowledge of the fence, uh, however he d—he stated (f. 111) about the conservation officer that it was a rumor that he had heard.

Q. Alright. But, he was willing to relate to you that that was a rumor that he had heard, was willing to talk to you about that to that extent?

A. Yes.

Q. Okay. Now the thing that he was evasive about and was hesitating in talking to you about was the absence of Mr. Walker. Is that correct?

(f. 112) A. Yea, that is correct.

Q. And, it's fair to say that, well, you state yourself here—you state that you wouldn't talk about who shot Walker? Is that correct?

A. That is correct.

Q. Okay. And, after that point that he said he wouldn't talk about who shot Walker was when you—you asked him—"Is it safe to sssume that you (meaning John Spring and Walker and Wagner) went out together and only you and Wagner came back alive?" Is that correct?

A. That question of mine and his answer was toward the end of the interview, yes.

(f. 113) Q. Right. Then it was after the point in time where early on he'd say I don't—I didn't—I don't want to talk about who shot Walker. Is this correct?

A. I don't recall. I don't know. And I would be—if I said uh he told me that he didn't want to talk about who shot Walker, I would be totally remiss. There were several an—questions that were not answered and several that were answered with shrugs of the shoulder and he—he at one time he did say I would rather not talk about that, but I cannot say exactly which reaction, which type of answer I uh was referring to there.

Q. Alright. But, in any event, those responses that you've just related to the Court came before your—(f.

114) your question that uh—is it safe to assume, etc . . . before you left.

A. It probably—it probably did come before that question, yes.

Q. Okay. Thank you. Now, how detailed was he about describing how the gun was gotten away from Walker before he went out, went down to flush out the animal?

(f. 115) A. He did not go into detail about that.

Q. Did he go into—did he say who got the gun? He or Wagner?

A. He.

Q. Did he tell you anything about where he gun was when Walker was shot?

A. Only the impression I had that he still had the firearm.

Q. In the van, on his person, do you know?

A. I don't know.

Q. Did he say anything to indicate whether this was done immediately before he went down into the ravine, or earlier that evening, or the previous day? Any time element involved here?

(f. 116) A. The time element involved is that it had to do with the time prior to his going into the ravine to flush the deer out.

Q. Okay. But, to the best of your memory its—John Spring didn't pin down how much prior to, did he?

A. No, he did not.

Q. Agent Wactor, you stated that you were at the bond hering when Magistrate Calvin Hamilton advised Mr. Spring?

A. That is correct.

Q. And what was he being advised for at that (f. 117) time? What was he being held for that he was advised on?

A. It was a standard bail bond hearing following my complaint, made and sworn with Magistrate Hamilton that Mr. Spring and Mr. Beam had been arrested and that I was charging them with violation with one of the sections in the Gun Control Act. Title 18 United States Code 922 —I believe it's J, in that they had uh part of a raids to barter or sell uh stolen firearms, which were moving as, or which constituted interstate commerce.

Q. And that was the extent of it? It related (f. 118) to the offenses that were occurring around the arrest of March 30th, correct?

A. Yes.

Q. He wasn't being advised for any other offense or possible offense at that time, other than what you have just told us?

A. He was attending a bail bond hearing on those charges.

Q. Okay, sir, you've related that at the time of the arrest of John Spring on March 30th, in parts you were relying on information from George Dennison. Is that correct?

A. That is correct.

Q. Alright. What kind of arrangement had you made with George Dennison for his aide and help?

(f. 119) A. George Dennison, uh, was recruited as an informant and he has elected to come forward in this case, therefore I can't discuss this. Uh, he was to provide information about the activities of his associates or friends regarding their theft and sale of firearms and other information as it became apparent. There was—he elected to do this and he told me, because it was out of fear of Mr. Spring and Mr. Wagner.

Q. Did he tell you why he feared these two men?

A. Yes, he did. He told me that Mr. Spring and Mr. Wagner and I believe another female, I don't recall who it was, had come to Kansas City from Colorado. They had (f. 120) difficulty with their car and Mr. Spring—correction—Mr. Dennison and Mrs. Dennison drove these people up to Iowa. On the trip up there Mr. Dennison described how Mr. Spring and Mr. Wagner had described the killing of Mr. Walker and how Mr. Wagner set in the back seat of the vehicle spinning the cylinder on a revolver.

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(f. 145) Q. Agent Wactor, you followed John Springs's case clear through to when he entered a guilty plea in Federal Court, didn't you?

A. Yea, are you asking if I attended all of the Court sessions?

Q. Well, no, not attended them, but you were aware of what was going on with this case?

A. Yes, sir, I was.

Q. Okay, and you were aware of when he entered his guilty plea?

A. No, I did not attend his guilty plea.

Q. Were you aware it was July 5th, or approximately there abouts 1979?

(f. 146) A. I would have to look in the case report. I don't know.

Q. Were you aware that the time you talked to him July 13th, 1979, that is was after his guilty plea had been entered?

A. Yes sir.

Q. And, you were familiar enough with this case to know that he was represented by a lawyer in that case, were you not?

A. Yes sir, that is correct.

Q. Do you know that lawyer's name?

A. No sir, I don't recall what lawyer defended him.

(f. 147) Q. Did you know at the time?

A. At—at—during the course of the Court action subsequent to his arrest, yes I did.

Q. Now, you did not call John Spring's lawyer that he had just had on this Federal Case before you went to talk to him July 13th, did you?

A. No, I'm not required to.

(f. 148) Q. And, you didn't call him during that conversation, did you?

A. No, I did not.

Q. Does the name Thomas Fisher ring a bell?

A. Um— he is a defense attorney, but I do not know if he was Mr. Spring's attorney.

Q. Alright. Did you ever talk with Mr. Spring's attorney that you suspected Mr. Spring of?

A. I never had any conversations with the defense attorney that I recall.

• • •

(f. 150) Q. Now, Agent Patterson was present with you when you talked to John Spring on July 13th, 1979, correct?

A. That is correct.

Q. How many times do you recall Mr. Spring telling you that he didn't want to talk about anything about Walker's death?

A. He never said he did not want to tell anything about Walker's death.

Q. How many times did he indicate that he didn't want to talk about it?

A. In referring as to who shot Mr. Walker, (f. 151) I believe there was only one time that he said I'd rather not talk about that, or words to that effect.

Q. Do you recall Agent Patterson asking John Spring if he had taken the gun off Walker's body?

A. I don't recall if he asked that.

Q. Do you recall if you asked it?

A. No, I did not.

Q. And you don't recall Spring saying that he would rather not talk about that?

A. No.

Q. Okay. Do you recall Agent Patterson asking John Spring if he had shot Walker?

A. I believe he did—one of us asked him if he'd shot Walker.

(f. 152) Q. Okay. And do you recall John Spring's response?

A. I believe that that was the point where he said he'd rather not talk about it.

Q. Okay. And, do you recall yourself or Agent Patterson asking John Spring if Wagner had shot Walker.

A. Yes, one or the other of us did ask him.

Q. Okay. And, again, what was John Spring's response?

A. I don't recall his response to that question, apparently we did not receive any sort of an answer. I don't know.

Q. Isn't it true that he responded that he didn't want to talk about that again?

(f. 153) A. He may have.

Q. Isn't it also true that these questions about Walker's death were interspersed in other more general conversation about other things?

A. No, uh, it was uh when we started to talk about the Walker death, we stayed with that generally.

(f. 154) Q. Alright, besides the three questions I just mentioned here, what other questions did you ask John Spring about the Walker death?

A. Exact questions I can't give you. He was asked in general questions about it, if uh—when it occurred, if he was present, if he shot him, if Wagner shot him. He was asked about the pistol. I asked him a question is it safe to assume three of you had gone out and only you—Walker and Wagner had gone out and only you and Wagner had come back alive. Those are the specific type of questions that I do recall.

Q. Okay, and it's your testimony that those questions, one followed another and there was never any conversation about anything else interspersed within that conversation?

(f. 155) A. I'd have to say that that is generally correct. I might have—no, I'd have to say that that is correct, to the best of my recollection.

Q. Would it be fair to say that every time John Spring stated that he'd rather not talk about a question about Walker's death, that you or Agent Patterson backed off and asked a more general innocuous question?

A. No, I'd say that we went to a different topic. If he said uh, if in reply to a question, did you shoot Walker, if he stated that—he replied that he would rather not talk about it, then we'd go to a different question concerning the uh—

Q. Concerning Walker's death?

(f. 156) A. Walker homicide, yes, which he readily answered.

Q. But, often as not, that answer was I'd rather not talk about it, right?

A. No sir.

• • •

(f. 157) Q. Sir, when did you first contact any agency in Colorado concerning a possible homicide here in Colorado?

A. It was during March of 1979. I do not recall the exact date because I didn't make a note of it. I'd contacted the ATF Office in Denver. They relayed the information and I received a call back from the Craig Police Department. I had given the information and whoever I talked to gave them the information and uh, I was informed (f. 158) to the effect that someone would be getting back with me when the snow cleared if they found the body.

Q. Do you recall when that conversation with somebody in Craig was?

A. It was approximately the middle of March. Thereabouts.

Q. And do you know who it was you talked to?

A. No, I do not.

Mr. Bratfisch: No further questions, your Honor.

REDIRECT EXAMINATION

By Mr. Saba: Mr. Wactor, do you recall whether or not the statement of rights form that you previously entered—that had been previously entered into evidence informs, or informed the Defendant that he had the right to stop questioning, stop the questioning at any point in time?

(f. 159) A. Yes sir, I believe that is contained in that.

Q. Okay, Mr. Bratfisch brought out the point that Mr. Spring had indicated to you once and possibly twice that he'd rather not talk about particular issues. Do you recall that?

A. Yes sir.

Q. Did he at any time, did Mr. Spring at any time ask that you stop the questioning?

(f. 160) A. He did not.

Q. Did he at any time indicate a reluctance to proceed with the questioning?

A. No, he did not.

• • •

(f. 173) By Mr. Saba: Mr. Wactor, I believe that on cross-examination Mr. Bratfisch asked you a question to the effect of, "In your mind did Mr. Spring distinguish between signing the waiver and making an actual waiver", do you recall that question?

(f. 174) A. No, I don't.

Q. Well, let me ask you the question—do you recall—do want me to restate it?

A. Yes, please.

Q. Did Mr. Spring, in your mind, distinguish between signing the waiver and making an actual waiver?

A. Yes, he did.

Q. Okay. Now, could you explain that a little bit further? What does—what exactly do you mean?

(f. 175) A. It is my opinion, attained during the conversation after informing him of his rights, our wanting—showing him that uh we were going to leave and his stopping us, saying that he would testify, uh—correction that he would talk to us, but he wouldn't sign anything—it is my opinion that he was giving me a waiver of his rights to counsel and to remain silent, that he would talk to me, but that he would not sign it and it is my opinion that it would put us at this situation where we are here now, my word against his word, or, if he were to take the stand.

Q. Okay. During that session, during that particular interview did Mr. Spring ever ask you for an attorney?

A. No, he did not.

• • •

(f. 179) Q. Okay. Do you personally know for what alleged crimes they were arrested at that point?

A. At the time of the arrest, we had probable cause to believe that we had four separate violations of Federal Firearms Law. That is, uh, from the appendix of Title 18 of the United States Code; A felon in possession of a firearm; From Title 18 (f. 180) of the United States Code; "dealing in firearms a felon transporting or causing a firearm to be transported in interstate commerce"; and the bargaining or bartering of stolen firearms transporting interstate commerce.

• • •

(f. 183) RE-DIRECT [SIC] BY MR. BRATFISCH

By The Court: Okay. Let's try to expedite this if we can.

By Mr. Bratfisch: Agent Wactor, you've indicated that in your mind John Spring made a distinction between talking to you after signing a waiver and not signing a waiver? Correct?

A. I—uh Mr. Spring made a distinction between waiving it and signing a waiver, yes sir.

(f. 184) Q. Right. And you've indicated that that's a distinction that in your mind he felt meant something?

A. Yes sir.

Q. Alright. At that point did you ever take it upon yourself to explain to Mr. Spring that as far as the law was concerned there was no real distinction in as much as how that could be used in Court against him?

A. No sir.

Mr. Saba: Objection, your Honor. I don't know how that is relevant. I don't see that he has any responsibility to do that.

By The Court: Well, I'm not sure that he has the responsibility either, but it has been asked and answered, I'll permit it to remain.

(f. 185) By Mr. Bratfisch: Sir, you testified that its your thought and feeling that Mr. Spring probably thought that it would be his word against yours in Court about what was said because that wasn't signed. Is that correct?

A. I would be his word against mine about whether he granted a waiver or not. But, in my mind he had definitely granted an oral waiver.

Q. Alright. But that's your guess as to what was in Mr. Spring's mind, was it not?

A. Yes sir.

Q. Okay. In actuality it could be that Mr. Spring was assuming that if he didn't sign the waiver then what

he said could not be used in Court. That's possible, isn't it?

Mr. Saba: Objection, your Honor.

By The Court: Sustained.

Mr. Bratfisch: No further questions.

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(f. 188) Mr. Saba: Your Honor, the People would call the next witness, Joseph A. Patterson.

(f. 189) By The Court: Step right up here, Mr. Patterson. Do you solemnly swear that the testimony that you are about to give in the cause before the Court shall be the truth, the whole truth and nothing but the truth, so help you God?

Agent Patterson: I do.

Q. (By Mr. Saba) Please state your name and business address for the record?

(f. 190) A. (Mr. Patterson) Joseph A. Patterson, 1150 Grand Avenue, Kansas City, Missouri.

Q. Mr. Patterson, what is your main professional occupation?

A. Group Supervisor for the Bureau of Alcohol, Tobacco and Firearms.

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(f. 191) Q. Okay. Did you have the occasion during March of 1979 to participate in the investigation of a person by the name of John Spring?

A. Yes Sir, I did.

Q. Okay. And in what capacity?

A. I was on a surveilance and cover team on March 30th.

Q. Okay. Were you present for the surveilance that took place on March 30th?

* * *

(f. 195) Q. Why were they arrested?

A. Selling firearms without a license. There were a number of charges that could have been made at that time.

Q. Okay. And what other charges were you aware of?

(f. 196) A. Felon in possession of a firearm. Interstate transportation of stolen firearms.

Q. Okay. After observing the arrest, you—did you personally know whether or not, or did you observe whether or not John Spring was advised of his rights?

A. Yes sir.

Q. Would you please describe in detail how that took place?

A. He was sitting in the back seat of an ATF vehicle. Special Agent Jack Malooly read him his rights per an ATF publication.

* * *

(f. 197) Q. Okay. Were you present at that full advisement?

A. Yes sir.

(f. 198) Q. Where were you?

A. Standing outside the vehicle.

Q. Where was Mr. Spring and Agent Malooly?

A. Mr. Spring was in the back seat of the car. Uh, I recall Mr. Malooly, Special Agent Malooly being in the front seat. On that I'm not exactly for sure. Mr. Spring was in the back seat.

Q. Can you state for a fact whether or not Agent Malooly read each right on that card, gave the full advisement?

(f. 199) A. Yes sir, he did.

Q. Okay, after your contact with Mr. Spring at the K-Mart parking lot, did you have any further contacts with Mr. Spring on March 30th, 1979?

A. Yes sir.

Q. Okay. Where and when did that take place?

A. This occurred at the ATF office at 1150 Grand Avenue at approximately 3:15 p.m.

Q. Okay, and what were the circumstances of that contact?

A. At that time he was again advised of his Constitutional Rights per ATF memorandum, or publication.

Q. Okay, and who advised him of his rights on that occasion?

(f. 200) A. Special Agent Christopher Sedouski.

Q. Okay, and were you present for that?

A. Yes sir.

Q. Did you observe whether or not Special Agent Sedouski utilized a statement of rights form, 3200.4?

A. Yes sir, he did.

Q. I hand you what's been marked People's Exhibit J and ask you if you would examine the same?

A. Yes sir.

Q. Is that the form that was utilized on that day?

A. Yes sir.

Q. Did you personally see John Spring sign this form?

A. Yes sir, I did.

(f. 201) Q. I note that it has two signatures by Mr. Spring, did you see him sign both times?

A. Yes sir.

Q. Did you see Agent Sedouski sign this form?

A. Yes sir, I did.

* * *

(f. 203) By Mr. Saba: Regressing for a moment, Mr. Patterson, to the time of the arrest immediately preceding that, were you verb—were you monitoring by any listening device the goings on between the undercover agents and John Spring and Jim Beam?

A. Yes, sir I was.

Q. Did you hear any communications made by either the undercover agents or John Spring with respect to the sale of firearms?

A. Yes, sir. We monitored the uh conversation between the (f. 204) two people.

Q. Okay. What communications do you recall?

A. I don't recall what the exact words were.

Q. Okay. Can you give us the sum and substance of those communications?

A. We could tell that the deal was going down—we left our positions and started moving in. We knew the arrest was forthcoming.

(f. 205) Q. Did the undercover agents and Mr. Spring and Mr. Beam appear to be in a bargaining position to you?

A. Yes sir.

Q. That's the point at which the arrest was made and you moved in?

A. Right.

Q. Okay, Mr. Patterson, returning to the advisement of rights, it took place at approximately 3:15. After the advisement did you then ask Mr. Spring any questions?

A. Yes sir, I did.

Q. Specifically did you ask any questions pertaining to his involvement in any possible criminal activity or incidents in the State of Colorado?

A. Yes sir. Prior to that I asked him if he had any criminal record. He stated that he had a juvenile murder record, (f. 206) which he had when he was age 10. Involved the shooting of his aunt. I then asked if he had

ever shot anybody else. At that time he kind of ducked his head and mumbled "I shot another guy once".

Q. Okay, did you ask him any further questions about the Colorado incidents?

A. Yes sir, I did. I asked him if he had ever been to Colorado. He stated no, that he had not.

Q. Did you ask him whether or not he shot Donnie Walker West of Denver?

A. Yes, sir, I did. I asked him if he had shot a man named Walker West of Denver and had thrown his body into a snow-(f. 207)drift. At that time he replied no.

Q. Okay. What was his demeanor at that time?

A. He—there was a long pause, then he kind of ducked his head and said no—there was no further comment on it.

Q. Do you have any other recollections of the statements that took place on that occasion?

A. No sir.

(f. 208) Q. Did that conclude the interview?

A. Yes sir.

Q. When was your next contact, if any, with John Spring?

A. The next time I saw Mr. Spring was on July 13th, 1979.

Q. Where did that take place and who was present?

A. This meeting took place in the Jackson County Jail at approximately 2:05. At that time I was with Special Agent Harold Wactor.

Q. And what were the circumstances or purposes for that particular meeting?

A. We were trying to ascertain the whereabouts of stolen firearms from Iowa.

(f. 209) Q. Okay. Do you recall whether or not John Spring was advised of his rights on that occasion?

A. Yes sir he was.

Q. Do you recall the procedure adhered to on that occasion?

A. Yes sir, standard procedure. Special Agent Wactor read Mr. Spring his rights from ATF publication 3200.4.

Q. Okay. After the reading of rights, do you recall whether or not John Spring indicated that he understood his rights?

A. Yes sir. Special Agent Wactor asked him if he understood his rights, he said he did.

Q. Do you recall whether or not John Spring signed the written waiver?

A. He did not sign the waiver.

(f. 210) Q. Do you remember the circumstances surrounding his declining to sign that waiver?

A. He merely stated that uh he wouldn't sign anything without his lawyer.

Q. Okay. Did he indicate to you that he wouldn't make a statement without his lawyer?

A. We stook (sic) up, getting ready to leave, he said I won't sign your form, but I'll talk to you. We sat back down and started talking.

(f. 211) Q. Did he ask for a lawyer?

A. No sir.

Q. Okay. And did you in fact—strike that—excuse me.

Q. Did you at that point ask Mr. Spring any questions?

A. Yes sir.

Q. Specifically directing your attention to questions regarding the incidents that may have taken place in Colorado, would you please indicate what questions you asked him?

A. At this time, during our conversation, Mr. Spring stated that he had been in Colorado. We tried to pinpoint the date, but we couldn't. He did say there was snow on the ground, and it was in 1979.

Q. Did he make any statements to you regarding Donnie Walker's .22 caliber automatic pistol?

(f. 212) A. Yes sir. As I said earlier, we were talking to him about stolen guns and were trying to ascertain some information on stolen guns and during the conversation I asked him where he got the .22 pistol he had and he stated that it had been Walker's gun.

Q. Did he explain under what circumstances he obtained possession of that gun?

A. No sir, he did not.

Q. Do you personally know whether or not—strike that, excuse me. Do you recall whether or not Mr. Spring made any statements connecting himself to Mr. Wagner and Donnie Walker?

A. During the conversation Mr. Spring stated that he was (f. 213) riding around, the three of them, Mr. Walker, Mr. Wagner and himself and that more or less the converation stopped there. At that time Mr. Wagner—er Agent Wactor—too many W's—uh said well, its safe to assume then that three of you were riding around, two of you came back alive, and at the time Mr. Spring kind of laughed and said "yes, you could say that".

(f. 214) Q. What was Mr. Spring's appearance and demeanor at that point?

A. Normal. Relaxed.

Q. Okay. Prior to that statement had Mr. Spring in any way indicated that he chose to stop answering your questions?

A. No sir.

Q. Prior to Mr. Spring's making that statement, did you in any way threaten Mr. Spring?

A. No sir.

Q. Did you in any way, did you promise him anything?

A. No sir.

Q. Did you do anything to compell or force him to make a statement?

A. Nothing.

Q. Do you recall whether or not Mr. Spring made any other (f. 215) statements relating to the incident in Colorado?

A. None that I can recall.

* * *

(f. 216) Q. When you had the interview with John Spring at which you and Agent Wactor were present in the Jackson County Jail, (f. 217) who was doing the questioning? Primarily?

A. It was both.

Q. Do you recall which of you was taking notes?

A. We both took notes.

Q. Did one of you seem to be taking more than the other?

A. Probably Agent Wactor took more notes than I did at that time.

Q. Do you have any recollection of Mr. Spring having related anything to you about ever being or deer hunting?

A. Uh, yes sir. I do recall he said the three of them had been riding around one night and that uh Donnie Walker had gotten out to walk into a ravine to drive a deer out.

* * *

(f. 218) Q. When Mr. Spring related this information to you regarding the fact that Mr. Walker went into a ravine to drive a deer out, preceding that, did Mr. Spring say anything to you about a pistol Mr. Walker may have had in his possession?

A. He said that the gun he had when he was arrested by ATF had been Walker's gun.

Q. Did he say how he obtained possession of that gun from Mr. Walker?

A. No sir, he did not.

(f. 219) Mr. Saba: I have no further questions at this time.

By The Court: Mr. Bratfisch.

Mr. Bratfisch: Thank you.

Q. Agent Patterson, on July 13th, 1979, where did you first meet John Spring at the Jackson County Jail?

A. It was in the uh recreation type room—large room, on the, I think, the 15th floor, one of the upper floors of the Jackson County Jail.

(f. 220) Q. Alright. And what did you or Agent Wactor say to him when you first walked in and met him there?

A. When we first walked in we identified ourselves, showed him our pocket commissions stated that we were Federal Officers, and he kind of laughed and stated "yea, I know who you are."

Q. Okay. Then what was said?

A. We went uh into an interview room with some other people in this recreational area where it was private and quieter, sat down and started advising him of his rights.

Q. Okay, that's the first thing you did when you went in the room, is advise him of his rights?

(f. 221) A. Yes sir.

Q. And that was read off that card?

A. Well, read off, not the card, it was off the uh long form.

Q. Alright. And you marked on that form when he refused to sign it that he had refused to sign it, correct?

A. Special Agent Wactor did, yes.

Q. Alright. And that's when you got up to leave and he stopped you and said "no, I'll talk to you, but I won't sign the form"?

A. That's correct.

Q. Okay. Agent Patterson, do you recall talking to John Spring about a detective magazine being interested and maybe (f. 222) writing a story about him?

A. No sir, I don't recall that.

Q. Do you recall Agent Wactor saying anything about that?

A. No sir, I don't.

Q. Agent Patterson, let's go back to the March 30th, 1979 statement. You contacted John Spring about 3:15 p.m. that day?

A. I initially saw him about 1:40 at the K-Mart parking lot.

Q. Alright. Did you question him at all there?

(f. 223) A. No, sir.

Q. Was it later, at about 3:15 that you questioned him?

A. It was after 3:15. We read his rights at 3:15 and after that we questioned him.

Q. Alright. Now, you already mentioned on direct that when I voir dired on that Exhibit that it was you present, officer Sedowski, Officer Shell and John Spring. Is that correct?

A. Right.

Q. How did this meeting take place? Did you all walk in at once, or what?

A. Special Agent Sedowski was in the finger-print room getting ready to process Mr. Spring, finger-print him, photograph him—that's when we walked in.

(f. 224) Q. Alright. That's when you walked in?

A. Right.

Q. Okay. How about Agent Shell?

A. I don't recall when he walked in.

Q. Alright. What was the first thing said to Mr. spring that you recall? In your presence?

A. I asked him his name.

Q. Did he respond?

A. Yes, said his name was John Spring.

Q. What next?

A. We talked about the stolen firearms from Iowa.

Q. You did that before you advised him of his rights?

A. No.

Q. Okay, after he said—

(f. 225) A. He was not questioned prior to being advised of his rights.

Q. Did you advise him of his rights before or after he told you his name?

A. He was advised before being asked his name. Before I did.

Q. Alright, and then he consented to talk to you and he (f. 226) told you his name and then you got him to talking about firearms. Is that about the order?

A. That's correct.

Q. And then, after you talked about stolen firearms, did later in the conversation you ask John Spring about a possible murder in Colorado? Is that correct?

A. I asked him if he had any criminal record.

Q. Alright.

A. And then he went from there.

Q. Alright. And then he replied about his criminal record as a juvenile, is that correct?

A. Right.

(f. 227) Q. And, he told you that um he had a record for killing his aunt when he was 10 years old. Is that correct?

A. Yes sir.

Q. And then you asked him if he'd ever shot anyone else, and that's when he mumbled something?

A. Right.

Q. And, it's your recollection that he mumbled "I shot another guy once"?

A. That's what he said.

Q. Were you aware that the same time his aunt was killed that another aunt was shot?

A. Not at that time, no.

Q. Isn't it possible that he could have mumbled that it (f. 228) was another person, not "guy"? Were you listening that closely?

A. Yes, sir I was.

Q. This question followed directly him stating that he had killed his aunt when he was 10 years old, is that correct?

A. Right.

Q. And you asked him if he had ever shot anyone else, is that correct?

A. Correct.

Q. And it is your memory that then he replied "I shot another guy once".

(f. 229) A. Right.

Q. And, he was mumbling with his head down at that point?

A. Plenty loud to hear what he said. He wasn't speaking—

Q. But he was mumbling and his head was down, is that correct?

A. Pardon?

Q. He was mumbling and his head was down?

A. Right. He wasn't speaking as loud as he had previously. I could understand what he said, though.

Q. Okay, and then you inquired where he shot him, but he decline to make any further comments in respect to that shooting. Is that correct?

(f. 230) A. Right. Correct.

Q. Okay, and then its when you asked him about whether or not he was in Colorado?

A. Right.

Q. And then you specifically asked him about the shooting of a man named Walker West of Denver and that's when he declined to talk about that. Is that correct?

A. He said no.

Q. He denied it?

A. Right.

Q. Now, Agent Patterson, John Spring readily admitted being in Colorado in 1979, didn't he?

A. On July the 13th.

(f. 231) Q. On July the 13th, he readily admitted that?

A. Right.

Q. Did he tell you when he had been in Colorado?

A. We tried to pin point the date, he couldn't recollect exactly what day it was. He said there was snow on the ground. And he knew it was 1979.

Q. Okay. And you continued to talk about firearms with him and you asked him about that .22 pistol that he had on (f. 232) him when he was arrested.

A. Right.

Q. Okay. And he stated that that had belonged to Walker?

A. Right.

Q. And then you asked him if he had taken it off Walker's body. Is that correct?

A. Right.

Q. And he stated that he would rather not talk about that. Is that true?

A. That's correct.

Q. And this is something that you wrote up in your own notes. Is that correct?

(f. 233) A. That's correct.

Q. And you had also, just to back up a minute, had written in your own notes that when John Spring at first refused to sign the waiver he stated he didn't want to sign anything without his lawyer. Is that correct?

A. Without talking to his lawyer.

Q. Right. And you remembered that well enough to actually put without his lawyer in your notes, didn't you?

A. Right.

Q. Then after John Spring stated that he'd rather not talk about where the .22 pistol came from, in the respect

to when he got it, you engaged in some more general conversation, did you (f. 234) not?

A. That's correct.

Q. And then after that general conversation, you asked John Spring if he had shot Walker, is that true?

A. Correct.

Q. Okay. And Spring again stated that he'd rather not talk about that. Is that correct?

A. Right.

Q. Then you asked him if Wagner had shot Walker. Is that true?

A. Yes.

(f. 235) Q. Okay. And again Spring stated that he'd rather not talk about that.

A. Right. Correct.

Q. What was this general conversation about that occured in the interim there?

A. He was talking about Iowa. Staying up in Iowa in the Cliff—Cliffland area. In caves up there.

Q. Camping out in those caves?

A. Camping out in caves.

Q. So it was something totally unrelated to the Walker homicide?

A. Correct.

Q. Is that correct?

(f. 236) A. Correct.

Q. Now Agent Patterson when John Spring stated that he'd rather not talk about whether or not he had taken the gun off Walker's body, at that point, did you back off and start a conversation about something a little different?

A. We talked to him earlier, we told him that if you want to ask the questions, fine, you don't have to. He said he understood that. We'd go on to another topic.

Q. Okay, but would you answer my question? At that point that he said he didn't want to talk about whether or not he had taken the gun off Walker's body, then what—what did you say at (f. 237) that point?

A. I don't recall the exact words—we still carried on a conversation.

Q. But the conversation somehow got off onto the uh the cliffs and the caves in Iowa? Is that correct?

A. We talked about that—we talked about several things.

Q. Then you got back to another pointed question about—you asked him if he had shot Walker, right?

A. Correct.

Mr. Bratfisch: No further questions, thank you sir.

(f. 271) IN THE DISTRICT COURT OF THE FOURTEENTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF MOFFAT AND STATE OF COLORADO

Criminal Action Number 79CR40

PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

JOHN LEROY SPRING,

Defendant.

ORDER

(Filed April 4, 1980)

THIS MATTER came regularly before the Court upon the Defendant's Motion to Suppress evidence and statements made by the Defendant to law enforcement officers and agents, and his motion to Dismiss Count V of the Information. The matter was heard by the Court on March 17, 1980, commencing at 10:00 a.m. (f. 272) The Defendant appeared in person and was represented by Paul R. Bratfisc. and Michael Gallagher, Attorneys at Law. The People were represented by Carroll E. Multz and Richard D. Saba. The Court took the testimony and received documentary evidence presented at the March 17, 1980, hearing and has considered the briefs submitted by respective Counsel and their arguments presented at the hearing, and being now fully advised FINDS, CONCLUDES and ORDERS as follows:

1. John Leroy Spring was arrested on March 30, 1979, (f. 273) in Kansas City, Missouri, by agents of the Bureau

of Alcohol, Tobacco, and Firearms for interstate transportation of stolen firearms, dealing in firearms without a license, and other related offenses. This arrest was made after the ATF agents, acting upon information provided by an informant named George Dennison, had set up a buy and sell transaction for firearms with Spring, and after the transaction had been substantially concluded in a K Mart parking lot in Kansas City, Missouri.

(f. 274) 2. Prior to Spring's arrest on March 30, 1979, Dennison had also given information to the ATF agents concerning Spring's statement to Dennison that he (Spring) and another person had killed one Don Walker in Colorado in February, 1979.

3. At the time of Spring's arrest on March 30, 1979, the evidence shows that the ATF agents were acting without an arrest warrant; had arranged the sale through Dennison, and had actively participated in negotiations for the sale and delivery of firearms from Spring to undercover agents in the K Mart parking lot. The officers actually observed the firearms in the trunk of the vehicle in which Spring arrived at the parking lot, and were in the process of transferring the firearms from that vehicle to the ATF undercover vehicle when (f. 275) the arrest was made. Thus there was probable cause for this arrest based both upon the information given by Dennison, and independently upon the direct personal observations of a crime in progress by the ATF agents.

4. At the time of the arrest and incident thereto, the ATF agents conducted a pat down search, and removed a .22 cal. pistol (Exhibit F) from Spring's jacket pocket.

5. Spring was advised by ATF agent Malooly at the scene of the arrest pursuant to the standard Miranda warn-

ing. Spring was then transported to the ATF Bureau Office in Kansas (f. 276) City, and was there re-advised of his rights by Agent Sadowski. Spring indicated to Agents Sadowski and Patterson that he understood his rights, and signed a written form waiving and acknowledging his rights in connection with the interrogation by Patterson and Sadowski, which ensued immediately.

6. The thrust of the interrogation conducted by the (f. 277) ATF agents on March 30, 1979, was directed toward the firearm transactions with which they were directly concerned. The agents were aware of Dennison's information concerning Spring's admission of involvement in a Colorado homicide, and did ask a few questions relating to that incident. Patterson asked Spring about a prior incident in which Spring shot an aunt as a juvenile. He then asked Spring if he had ever shot anyone else. Spring answered: "I shot another guy once." Patterson then asked Spring if he had been in Colorado and Spring replied, "No." Patterson asked if it were true that Spring had killed a Don Walker west of Denver and thrown the body in a snowbank. Spring said, "No."

(f. 278) 7. The Court finds that this questioning was conducted while the Defendant was in lawful custody, pursuant to a valid arrest; that Spring had been properly advised of his rights and was aware of his right to remain silent, to have Counsel present during interrogation, to stop the interrogation at any time; and that his reponses to the interrogation were made freely, voluntarily and intelligently; that there was no element of duress or coercion used to induce Spring's statements on March 30, 1979.

(f. 279) 8. Though it is true that Patterson and Sadowski did not specifically advise Spring that a part of

their interrogation would include questions about a Colorado homicide, the questions themselves suggested the topic of inquiry. The questions dealt with "shooting anyone" and specifically killing a man named Walker and throwing his body in a snowbank in Colorado. The questions were not designed to gather information relating to a subject that was not readily evident or apparent to Spring. Spring had been advised of his right to remain silent, his right to stop answering questions, and to have an Attorney present during interrogation. He did not elect to exercise his right to remain silent or to refuse to answer questions relating to the homicide, nor did he request Counsel during interrogation.

(f. 280) '9. The Court concludes that the statements made to Patterson and Sadowski on March 30, 1979, should not be suppressed, and may be admitted in evidence.

10. The .22 cal. pistol was lawfully seized in a lawful search pursuant to a valid and lawful arrest and should not be suppressed. Exhibit F is deemed admissible in evidence.

11. On May 26, 1979, Detective Curtis of the Moffat County Sheriff's Department and Agent Leo Konkel of the Colorado Bureau of Investigation interviewed Spring at the Jackson County Jail in Kansas City, Missouri. These Officers (f. 281) again advised Spring of his "Miranda" rights and Spring once again executed a written acknowledgement and waiver form. The Officers identified themselves, and told Spring they wanted to question him about the Walker homicide. Spring told the Officers he wanted to get it off his chest. The interview lasted approximately 1½ hours, and during that time Spring talked freely to the Officers, did not elect to refuse to answer any questions,

and never requested Counsel during the interview, although he was aware of his right to remain silent, to stop the interrogation, and to have Counsel present. There is no (f. 282) evidence that the interrogation, conducted in the "day room" of the jail was conducted in a coercive manner or that any threats or promises were made to Spring to induce his participation in the interview. After the interview was completed, Spring read and edited a written statement summarizing the interview prepared by Konkel, and signed the written statement. The Court finds that the statement given by Spring on May 26, 1979, was made freely, voluntarily, and intelligently, after his being properly and fully advised of his rights, and that the statement should not be suppressed, but should be admitted in evidence.

(f. 283) 12. Spring was next interviewed by Agent Patterson at the Jackson County Jail on July 13, 1979, after Spring had been found guilty of the firearms violations. Patterson's primary purpose of conducting this interview was to obtain additional information concerning Spring's knowledge of an additional cache of firearms and explosives. Agents Patterson and Wactor conducted this interview. They met Spring, Patterson identified the agents, and Spring laughingly said, "I know who you guys are." Spring was re-advised pursuant to the "Miranda" requirements using the standard ATF advisement (f. 284) and waiver form. Upon being advised on this occasion, Spring said, "I understand my rights but I won't sign anything without a Lawyer."

13. Patterson and Wactor got up and started to leave. As the agents were exiting the day room, Spring said, "I won't sign any forms without a Lawyer, but I'll talk to you." The agents then sat back down and continued their

discussion with Spring. During this interrogation, Spring admitted being in Colorado in 1979. He was asked about firearms, and he was (f. 285) specifically asked where he got the .22 cal. pistol the agents had seized (Exhibit F). Spring said, "That's Walker's gun."

Asked if he took the gun off Walker's body, Spring said, "I'd rather not talk about that." Asked if he shot Walker, Spring said, "I'd rather not talk about that." Asked if Wagner had shot Walker, Spring said, "I'd rather not talk about that."

Spring did say that he, Wagner and Walker had been riding around together, and that he had gotten the gun from Walker before Walker went into the ravine.

(f. 286) Patterson asked, "Is it safe to assume that you Wagner and Walker went out together and that only you and Wagner came back alive?" Spring replied, "Yeah, you could say that."

14. The Defendant urges that the statements made during the July 13th interview should be suppressed because of the continued interrogation after a request for Counsel. From the evidence presented, however, the request for Counsel was not for advice during interrogation, but for the purpose of advising him if he were to be asked to sign any "forms." (f. 287) Spring indicated that he did understand his right to remain silent, but that he did not want to exercise that right. He also was aware of his right to Counsel, but elected not to request Counsel unless "forms" were to be signed. He was advised that any statement he made might be used against him, and indicated that he understood that warning as well as the other "Miranda" warnings.

Spring did understand that he had the right not to answer questions, and exercised that right with respect to several specific questions.

(f. 288) Spring further urges that again he was not advised prior to the interview that he would questioned about the Walker homicide. However, once, again, the questions were not disguised ruse questions designed to trick an unwary person into admitting involvement in a crime of which he was totally unaware. By July 13, 1979, Spring had already told Curtis and Konkel about his involvement with Wagner in the shooting of Walker in the May 26th interview. In addition, (f. 289) by that time a warrant had been issued by this Court upon an Information charging Spring with Walker's murder. The arrest warrant issued on May 29th, 1979, and a hold had been placed on Spring in connection with the Moffat County murder charge before the July 13th interview.

15. The Court concludes that Spring made the July 13 statements to Patterson and Wactor after being fully and adequately advised of his "Miranda" rights, and that he knowingly and intelligently waived his right to remain silent or to have an Attorney present during questioning. The statements were made without inducement by coercion or threat. (f. 290) No promises were made by the agents to induce his statements. The statements of July 13, 1979, should not be suppressed, and should be admitted in evidence.

16. The Defendant contends as a matter of law that Count V of the Amended Information must be dismissed because the conviction therein alleged occurred after the date of commission of the principal offense of Murder as

contained in Count I of the Information. The alleged date of the murder is "on or about the 1st day of February, 1979 . . ." The date of the conviction relied upon in Count V of the Information to support penalty enhancement under C.R.S. 1973, 16-13-101 is July 5 1979.

(f. 291) 17. C.R.S. 16-13-101 provides "Every person convicted . . . who, *within ten years of the date of the commission of said offense, has been twice previously convicted . . .*" (emphasis added) shall be adjudged an habitual criminal. The Statute on its face would seem to require that the previous convictions relied upon must antedate the date of commission of the primary offense rather than the date of trial or conviction of the primary offense. This construction is consistent with (f. 292) the construction of similar Statutes in other States. See Annot. 24 ALR2d 1247, 1249. Such construction is also consistent with the general rule that criminal Statutes in derogation of the common law must be strictly construed, and doubtful questions of construction must be resolved in favor of the accused. The Court therefore concludes that Count V must be dismissed for failure to properly charge a criminal offense. Further, the dismissal of Count V will render Count IV of the Complaint Information invalid to state an offense and Count IV will, by dismissal of Count V, be mere surplusage. Count IV should also be dismissed.

(f. 293) For the foregoing reasons and based upon the Findings and Conclusions stated above,

IT IS ORDERED that the Defendant's Motion to Suppress evidence and statements is DENIED.

IT IS FURTHER ORDERED that the Defendant's Motion to dismiss Count V of the Information is GRANTED.

IT IS FURTHER ORDERED that Count IV of the Information is DISMISSED and STRICKEN as surplusage.

DATED this 4th day of April, 1980, at Craig, Colorado.

(f. 294) BY THE COURT:

/s/ Claus J. Hume,
District Judge

Copies to: Carroll E. Multz
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TRANSCRIPT OF ORAL RULING

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(f. 2630) The Court: Thank you, Mr. Multz. The Court has considered the Defendant's objection to the testimony concerning the matters heard during the in limine portion of the hearing. The Court is inclined to believe that the question in the Patterson interview as addressed in Paragraph 6 of (f. 2631) the Motion in Limine, the specific question, have you ever shot anybody else and the response, I shot another guy once, is irrelevant to this case. The whole context of the conversation indicates that it does not relate to the homicide in question before the Court because subsequently when specifically asked about the particular killing involved, the Defendant did deny that particular killing. The Court is inclined to believe that the conversation relating to whether or not the Defendant, Spring, shot a man named Walker, (f. 2632) west of Denver and threw his body in a gully or in a snowbank and the response to that question is admissible and should be admissible in this case but the other statement about shot another guy once and the question which elicited that statement is deemed by the Court to be irrelevant.

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No. 85-1517

In The

Supreme Court of the United States

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

vs.

JOHN LEROY SPRING,

Respondent.

On Certiorari to the Supreme Court of the State of Colorado

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

1. Does a valid waiver of the right to silence and the right to counsel necessarily require that the defendant be aware, prior to interrogation, of all of the possible subjects of interrogation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

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BRIEF FOR PETITIONER

OPINIONS BELOW

The trial court's unreported ruling is included in the Petition for Writ of Certiorari as Appendix A; the Colorado Court of Appeals' opinion is reported as *People v. Spring*, 671 P.2d 965 (Colo. App. 1983); the opinion of the Colorado Supreme Court is reported as *People v. Spring*, 713 P.2d 865 (Colo. 1985).

JURISDICTION

The judgment of the Colorado Supreme Court was issued on October 2, 1985. The state's timely Petition for Rehearing was denied on January 13, 1986. The Colorado Supreme Court did not rely on any independent state ground, but based its decision upon *Miranda v. Arizona*, 384 U.S. 436 (1966), and subsequent cases applying *Miranda*. The Petition for Certiorari in this case was filed on March 14, 1986, and granted by this Court on May 5, 1986. This Court has jurisdiction over this matter pursuant to 28 U.S.C. section 1257 and S. Ct. Rules 17.1(b) and (c).

—o—

CONSTITUTIONAL PROVISIONS

Amendment V of the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

Amendment XIV, section 1 of the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

—o—

STATEMENT OF THE CASE

In early February of 1979, the respondent John Spring and his friend Donald Wagner invited a man named Donald Walker to accompany them "elk hunting" in the snowy mountains west of Craig, Colorado. The respondent had mentioned to a friend several times that he was planning to kill Walker (ff. 3351-3353).[1] He and Wagner believed that Walker was a "snitch." In addition, Walker had dated the respondent's wife while the respondent was in prison (ff. 3351-3353).

The three men drove to a remote area and left Wagner's van. Wagner was carrying a rifle and the respondent, a flashlight (f. 3306). The fact that the respondent was wearing only a denim jacket, jeans and sneakers for a night of elk hunting in the wintry mountains apparently did not arouse Walker's suspicions (ff. 3232, 3302, 3314, 3392). Wagner told Walker to go along the road ahead of him, look into a ravine, and pick an elk (f. 3315). Walker did so, and asked the respondent to shine the flashlight into the ravine, but Wagner ordered him to shine it on Walker. When the respondent did, Wagner shot Walker in the head (f. 3317). The respondent was startled and dropped the flashlight, because he did not know that Wagner was going to kill Walker so close to the road (ff. 3198-3200). When Walker made a little choking noise, Wagner shot him a second time; he and the respondent then dragged the body to a ditch and kicked snow over it (ff. 3321-3323). The respondent commented that he was glad Wagner had

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[1]The record will be referred to by the folio numbers which appear in the left margin of each page of the record.

killed Walker, as he (the respondent) had been trying to "get rid of him" for awhile (f. 3186). Although the respondent claimed at trial that he did not plan the murder and aided Walker afterwards only through fear that Walker would kill him as well, he was impeached by his earlier admission to a Colorado police officer that he *did* know that night that Wagner was planning to kill Walker (ff. 3036-3037).

The respondent and Wagner bragged about their deed to another friend, George Dennison, who later proved to be an informant working with agents of the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). (f. 2724). The respondent told Dennison that they did not have to worry about Walker anymore, and that it had felt good to kill him (ff. 2724, 2733). He later reiterated that he had no bad feelings about killing Walker, because he had spent two or three years thinking about it and now could relax (Defendant's Exhibit TC). Dennison related this information (as well as other information concerning illegal gun transactions) to the ATF agents.

On March 30, 1979 the respondent was arrested by ATF agents on federal firearms charges, and was twice advised of his constitutional rights. In addition, he was advised that if he decided to answer questions without the assistance of an attorney, he had the right to stop the questioning at any time or to stop until the presence of an attorney could be secured (ff. 200-201; People's Exhibit J). The respondent was not specifically advised that he might be a murder suspect. He signed a written waiver form, and was then interrogated concerning the firearms violations. Toward the end of this interrogation, the respondent was asked if he had a criminal record. He replied that he had a juvenile record, acquired at the age of 10 when he killed his aunt. The agent then asked if he had ever shot anyone else. The respondent ducked his head and mumbled, "I shot another guy once." When the agent asked if he had ever been to Colorado, the respondent replied, "No." Finally, the agent asked whether he had shot a man named Donnie Walker west of Denver and thrown the body in a snowbank. After a long pause, the respondent ducked his head and said, "No." (ff. 206-208).

On May 26, 1979, the respondent made a statement to Colorado authorities in which he outlined his involvement in the murder, and admitted that he had known that Wagner planned to kill Walker that night (ff. 3036, 3037). A third statement, in which he admitted to ATF agents that it was he who had talked Walker into leaving his gun behind in the van, was made on July 13, 1979 (ff. 2970, 2986).

The trial Court initially ruled that the first statement was admissible (f. 280). However, during trial, the Court decided that only that part of the statement where the respondent denied shooting Walker was of sufficient relevance to be admissible.[2] The latter two statements were

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[2]The prosecution chose not to use this denial at trial. However, if a retrial of this case proves necessary, the statement may be needed. In addition, the respondent's Brief in Opposition to Petition for Writ of Certiorari argues that, since the first statement was obtained by "improper tactics" rather than a simple failure to administer *Miranda* warnings, then *Oregon v. Elstad*, 105 S. Ct. 1285 (1985) does not apply, and the second statement must be presumed to be tainted by the first. Thus, the constitutional validity of the first statement is very much a live issue.

admitted at trial, and the respondent was convicted of first-degree murder.

On appeal, the Colorado Court of Appeals reversed the respondent's conviction, finding that the respondent's statements of March 30, 1979 and July 13, 1979 were obtained in violation of *Miranda*, and that his May 26, 1979 statement was tainted by the March 30, 1979 *Miranda* violations. The Colorado Supreme Court, while reserving ruling on the taint issue, affirmed the court of appeals on the matter of *Miranda* violations. With respect to the March 30, 1979 statement, the Court held that although the police have no specific duty to advise a suspect of the subject of interrogation, unless the evidence shows that the suspect knows at least the general nature of the crime involved from *some* source, then the waiver of rights has not been shown to be knowing, intelligent and voluntary. With respect to the July 13, 1979 statement, it held that the authorities had improperly continued to question the respondent after he had made ambiguous remarks which could have indicated a reluctance on his part to talk further.[3]

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[3]The July 13, 1979 statement was made to ATF agents after an information charging the respondent with murder had been filed in Colorado, and he had entered a plea of guilty in the federal firearms case. The agents advised him again of his *Miranda* rights and warned him he could stop their questioning at any time. The respondent stated that he would not sign a waiver form without his attorney. Without another word, the agents closed their clipboards and stood to leave. The respondent stopped them, saying he knew his rights, he did not want to sign anything, but he did want to talk with them. The agents then resumed the interview. (The respondent has never challenged the validity of his waiver of the right to counsel.)

The respondent was told that if he wanted to answer questions that was fine, but that he did not have to. He replied that

(Continued on following page)

Certiorari review was granted by this Court to consider whether a valid waiver of the right to silence and the right to counsel requires that the suspect be aware prior to interrogation, of all of the possible subjects of interrogation.[4]

(Continued from previous page)

he understood that. On the topic of the Walker murder, several questions were not answered, several were answered with a shrug of the shoulder, and once or twice he replied, "I don't want to talk about that." Each time the respondent said he would rather not talk about "that," the agents went on to a different question, which the respondent readily answered. Questions which the respondent refused to answer were not asked again. In the course of that discussion, the respondent revealed that he had talked Walker into leaving Walker's gun in the van, and that he had been carrying Walker's gun when arrested on the federal gun charges.

[4]This issue concerns only the March 30, 1979 statement. It does not concern whether the July 13, 1979 statement was improperly obtained, a matter which the Colorado Supreme Court found to be reversible error in and of itself.

With respect to the July 13, 1979 statement, the Colorado Supreme Court ruled that once a suspect indicates *in any way* that he does not wish to answer a question, the interrogating officers have an "affirmative and emphatic duty" to determine whether the suspect is exercising his privilege against self-incrimination in all respects or is merely reluctant to answer the particular question. The impact on the State of Colorado, which will be required to retry this case even if successful on the issue on which certiorari has been granted, warrants this Court's addressing this additional issue also, even if summarily. S. Ct. Rule 34.1(a); *See Batson v. Kentucky*, 106 S. Ct. 1712 (1986) (Stevens, J. concurring); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Illinois v. Gates*, 462 U.S. 213 (1983). The issue is one of great importance, and can be expected to recur often, *Cf. Smith v. Illinois*, 105 S. Ct. 490, 493 n. 3 (1984). A significant body of case law supports the conclusion that the conviction here for this most serious of crimes should not have been reversed on this basis. *E.g. Vail v. State*, 599 P.2d 1371 (Alaska 1979); *Reeves v. State*, 241 Ga. 44, 243 S.E.2d 24 (1978), *cert. denied* 439 U.S. 854; State v. Nichols,

(Continued on following page)

ARGUMENT

A VALID WAIVER OF THE RIGHT TO SILENCE AND THE RIGHT TO COUNSEL DOES NOT REQUIRE THAT A SUSPECT BE AWARE, PRIOR TO INTERROGATION, OF ALL OF THE POSSIBLE SUBJECTS OF INTERROGATION.

The premise underlying the Colorado Supreme Court's opinion is that a suspect in custody who has been properly advised of his *Miranda* rights, but does not know that he is also suspected of crimes other than those for which he was arrested, cannot make a knowing and intelligent waiver of his fifth amendment rights.

In *Miranda v. Arizona,* 384 U.S. 436 (1966), this Court recognized that custodial interrogation often generates compelling pressures which work to undermine a criminal suspect's will to resist and may compel him to speak. In order to protect the fifth amendment rights of criminal suspects and to ameliorate the compulsion inherent in custodial investigation, *Miranda* imposed upon the police

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212 Kan. 814, 512 P.2d 329 (1973); *State v. Perkins,* 219 Neb. 491, 364 N.W.2d 20 (1985); *Lamb v. Commonwealth,* 217 Va. 307 227 S.E.2d 737 (1976); *See also State v. Padilla,* 101 Idaho 713, 620 P.2d 286 (1980); *State v. Bradfield,* 29 Wash. App. 679, 630 P.2d 494 (1981). *See also Fare v. Michael C.,* 442 U.S. 707, 727 (1979) ("At some points [the suspect] did state that . . . he could not, or would not, answer the question, but these statements were not assertions of his right to remain silent"); *compare* the approach of the Colorado Supreme Court, prior to the instant case, in *People v. Roark,* 643 P.2d 756 (Colo. 1982) ("(H)ad the defendant wished to terminate all further interrogation, he easily could have done so by simply stating that he did not want to answer any further questions.")

an absolute duty to follow certain procedures prior to interrogation. Accordingly, the police must advise the suspect that he has the right to remain silent and the right to counsel, and that if he cannot afford an attorney, one will be appointed for him. The police must also warn the suspect that anything he does say can and will be used against him. 384 U.S. at 468-470.

The respondent does not suggest that the ATF agents here failed to follow the dictates of *Miranda.* Rather, he argues that his waiver was not made knowingly and intelligently because he did not know that the ATF agents were aware of the Colorado murder; their failure to inform him that they suspected him of the murder as well as the gun charges deprived him of information necessary to a knowing and intelligent waiver of his fifth amendment rights. This argument finds no support in the prior decisions of this Court.

Miranda provides that a suspect may waive his fifth amendment rights. 384 U.S. at 444-447. This waiver must be an intentional and voluntary relinquishment of a known right. *Johnson v. Zerbst,* 304 U.S. 458 (1938). A *Miranda* waiver is voluntary when it is the product of a free and deliberate choice rather than intimidation, coercion or deception; it is knowing and intelligent when it is made with a full awareness of the nature of the right being abandoned and the *consequences* of the decision to abandon it. *Moran v. Burbine,* 106 S. Ct. 1135 (1986); *Fare v. Michael C.,* 442 U.S. 707, 725 (1979).

In its decision, the Colorado Supreme Court reasoned that a knowing and intelligent waiver of *Miranda* rights must be supported by actual knowledge of the

charges, because the *consequences* of waiver will vary considerably, depending on the severity of the charges. The Court wrote:

> It is a far different thing to forego a lawyer where a traffic offense is involved than to waive counsel where first-degree murder is at stake.

People v. Spring, 713 P.2d 865, 873 (Colo. 1985), (quoting *Commonwealth v. Collins*, 436 Pa. 114, 259 A.2d 160, 163 (1964)). The Colorado Supreme Court assumed that the "consequences" referred to by this Court constitute *all* of the possible legal and factual consequences that a waiver of rights might produce in the suspect's life.

The Colorado Supreme Court has misconstrued the nature of the consequences which a suspect must understand. *Miranda* clearly stated the exact "consequences" of which the suspect must be made aware:

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in Court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of *these consequences* that there can be any assurance of real understanding and intelligent exercise of the privilege.

384 U.S. at 436 (emphasis added). Clearly, the suspect need not be aware of *all* of the possible legal and factual consequences of waiver, but only of the consequence that his statement can and will be used against him. The consequences of which the suspect must be aware are the same whether the charge is a traffic offense or first-degree murder.

In recent cases, criminal defendants have argued to this Court that their waivers of fifth amendment rights were not knowing and intelligent, because the police, although fully advising them of their *Miranda* rights, failed to furnish important additional information. In *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), the defendant argued that he was unable to give a fully informed waiver because he was unaware that a prior incriminating statement made by him would ultimately be held inadmissible. In *Moran v. Burbine, supra,* the defendant argued that his waiver was invalid because the police failed to inform him that an attorney had telephoned and offered to represent him. These arguments were firmly rejected by this Court. In *Elstad*, this Court wrote that it

> has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. (citations omitted) . . . Thus we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case.

105 S. Ct. at 1297-98. In *Moran v. Burbine*, the Court commented:

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right . . . No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand

> by his rights. [citations omitted]. Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

106 S. Ct. at 1141-42.

It is clear that a knowing and intelligent waiver does not require that the suspect know all of the information which a careful attorney would demand before determining whether waiver would be the wisest course of action under the circumstances. *United States v. Anderson,* 533 F.2d 1210 (D.C. Cir., 1976); *Cf. United States v. Washington,* 431 U.S. 181 (1977). It is not in the sense of shrewdness or wisdom that *Miranda* speaks of an intelligent waiver, but in the sense of understanding constitutional rights; whether a waiver is, under the circumstances, wise or foolish is constitutionally irrelevant. *Harris v. Riddle,* 551 F.2d 936 (4th Cir. 1977), *cert. denied* 434 U.S. 849; *Collins v. Brierly,* 492 F.2d 735 (3rd Cir. 1974), *cert. denied* 419 U.S. 877.

The language and purpose of the fifth amendment support this conclusion. The fifth amendment states that no person shall be *compelled* to be a witness against himself in a criminal case. U.S. Const. Amend. V. It does not state or infer that a suspect shall not be permitted to confess, only that the state may not force him to do so. *State v. McKnight,* 52 N.J. 35, 243 A.2d 240 (1968). The amendment was meant to protect suspects from police overreaching, not from their own moral standards, miscalculations, or ignorance. *Oregon v. Elstad, supra.* The

respondent's arguments below, and the Colorado Supreme Court's opinion, have inferred that this is somehow unfair, but, in fact, it is no more unfair, unlawful, or unconstitutional to use a statement unwittingly or foolishly made by a warned defendant than it is to use clues found at the scene of the crime which a brighter, better informed, or more artful criminal would not have left. *State v. McKnight, supra.*

Perhaps the most basic purpose of government is to provide law and order, to protect its citizens from criminal attack in their homes, in their work, and in the streets. *State v. McKnight, supra,* at 250. The Constitution was never meant to thwart that aim; it does not shield criminals from zealous investigation and resolute prosecution, and it does not make the criminal law a game, where both sides must be given an equal opportunity to win. Assuming always that a suspect (if in custody) has been warned and understands that he need not speak at all, the police *may* exploit his ignorance or stupidity in the detectional process; such a practice is completely consistent with good morals and with the Constitution. *State v. McKnight, supra,* at pp. 250, 251.

The ruling of the Colorado Supreme Court, would, in practice, require the police to take the place of counsel, a role alien to their duties and training. *United States v. Frazier,* 476 F.2d 891 (D.C. Cir. 1973). Since the police could never be certain what facts the suspect was aware of prior to questioning, some officer would be required to correlate all of the facts then known to all of the officers, apply a legal analysis to those facts, determine which could arguably be relevant to the suspect's decision, and advise

the suspect. The officer would be required to tread a narrow and often impossible course: too little information or incorrect information from a non-legally trained officer could result in claims such as the one raised in this case. Too much information could arguably result in the very coercive atmosphere which *Miranda* sought to diffuse: in spite of the warnings, a suspect could feel that it was useless to deny his guilt in the fact of overwhelming evidence. Moreover, a thorough briefing could result in actually undermining the suspect's understanding of his rights: where an officer is required to act initially as his adviser, the suspect may well misunderstand that the police are in an adversary position and that the officer *can and will* use any resulting statement against him. The officer would be required to apply a legal analysis to each statement of the defendant to determine if, in light of all the information known and in light of the law, the suspect had admitted a new crime or suggested a new course of inquiry of which he must be advised. In short, the police would be required to act as counsel, a burden not properly theirs. *Harris v. Riddle,* 551 F.2d 936 (4th Cir. 1977), *cert. denied* 434 U.S. 849.

The alternative would be to have counsel available to every suspect subject to interrogation—but this alternative is already required by *Miranda*. Thus, when a suspect chooses to waive counsel, he has chosen to waive his best opportunity to collect this type of information. This threshold decision is for the suspect to make, and the police should not be required to relieve him from the results of this decision. *United States v. Hall,* 396 F.2d 841 (4th Cir. 1968), *cert. denied* 393 U.S. 918.

Finally, one of the principal advantages of *Miranda* has been the ease and clarity of its application. *Berkemer v. McCarty,* 468 U.S. 420, 430 (1984). It clearly informs police and prosecutors what they must do before conducting a custodial interrogation. *Moran v. Burbine,* 106 S.Ct. 1135, 1143. *Miranda* struck a delicate balance between the duty of the police to effectively enforce the criminal law and the right of suspects to be free from official compulsion. The balance remains correct. Full comprehension of the rights to remain silent and to consult an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process. *Moran v. Burbine, supra.* A rule requiring that the suspect to be aware of the nature of the charges, the elements of the crime, or any other information might leave him better informed about his *situation,* but no better informed about his *rights;* such a rule would not enhance the fifth amendment's protection, but would place an additional, unnecessary handicap on legitimate criminal investigation. Neither the fifth amendment, *Miranda,* nor the public interest requires such a result.[5]

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[5]The vast majority of jurisdictions which have considered the issue have determined that a suspect need not be aware of all of the possible charges he faces in order to execute a valid *Miranda* waiver. *United States v. Burger,* 728 F.2d 140 (2nd Cir. 1984); *United States v. Dorsey,* 591 F.2d 922 (U.S. D.C. Ct. App. 1978); *Harris v. Riddle,* 551 F.2d 936 (4th Cir. 1977), *cert. denied* 434 U.S. 849); *United States v. Anderson,* 533 F.2d 1210 (D.C. Ct. App. 1976); *Collins v. Brierly,* 492 F.2d 735 (3rd Cir. 1974); *United States v. Campbell,* 431 F.2d 97 (9th Cir. 1970); *United States ex. rel Smith v. Fogel,* 403 F. Supp. 104 (N.D. Ill. W.D., 1975); *James v. State,* 230 Ga. 29, 195 S.E.2d 448 (1973); *People v. Merchel,* 46 Ill. Dec. 751, 91 Ill. App. 3d 285, 414 N.E.2d 804 (1980); *People v. Smith,* 108 Ill. App. 2d 102, 246 N.E.2d 689 (1969), *cert. denied,* 397 U.S. 1001; *State*

(Continued on following page)

CONCLUSION

A waiver of *Miranda* rights is knowing and intelligent if the defendant is aware that he has the right to remain silent, the right to an attorney, and the right to have counsel appointed if he is indigent, and if he is aware that anything he says can and will be used against him. A suspect need not know all of the facts known to or suspected by the police in order to waive: *Miranda* requires that a suspect be made aware of his Constitutional rights, not his circumstances. The Colorado Supreme Court's ruling utterly confuses the law of *Miranda,* which until now has been relatively clear; it upsets *Miranda's* delicate balance, handicapping law enforcement officials with no concomitant benefit to the protection of suspects' fifth amendment rights. For these reasons, the petitioner requests that this Court hold that the Colorado Supreme Court erred in finding that the federal Constitution and *Miranda* were violated here. The petitioner requests that

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(Continued from previous page)

v. *Russell*, 261 N.W.2d 490 (Iowa 1978); *Commonwealth v. Griswold*, 5 Mass. App. 764, 358 N.E.2d 482 (1977); *State v. McKnight*, 52 N.J. 35, 243 A.2d 240 (1968); *People v. MacDonald*, 61 A.D.2d 1081, 403 N.Y. Supp. 2d 337 (1978); *People v. Pereira*, 258 N.E.2d 194, 26 N.Y.2d 265, 309 N.Y. Supp. 2d 901 (1970); *State v. Schneider*, 306 N.C. 351, 293 S.E.2d 157 (N.C. 1982); *State v. Woods*, 117 Wis.2d 701, 345 N.W.2d 457 (1984); *cf. United States v. Frazier*, 155 U.S. App. D.C. 135, 476 F.2d 891 (D.C. Ct. App. 1973); *United States v. Hall*, 396 F.2d 841 (4th Cir. 1968); *State v. Rupe*, 101 Wash. 2d 664, 683 P.2d 571 (1984).

the case be reversed and remanded for proceedings consistent with that ruling.

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No. 85-1517

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF COLORADO

Petitioner,

v.

JOHN LEROY SPRING

Respondent.

On Writ Of Certiorari To The Supreme Court of Colorado

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Colorado Supreme Court, applying the *totality of the circumstances* standard, correctly concluded that Mr. Spring's *Miranda* waiver was not knowing and intelligent?

2. Whether the Colorado Supreme Court, applying the *totality of the circumstances* standard, correctly concluded that Mr. Spring's *Miranda* waiver was not voluntary?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

STATEMENT OF THE FACTS

1. Early in the month of February, 1979, the Respondent John Spring, his wife Becky Spring and Donald Walker were staying at the home of Donald Wagner in Craig, Colorado. (Tr. 3225-26, 3293)[1] On or about the second or third of February, John Spring and Donald Wagner went hunting and bagged a deer. (Tr. 3286-87) After they returned and told Donald Walker about it, Walker was included in their plans for going the next night to try for an elk. (Tr. 3291)

The following evening, John Spring, Donald Wagner and Donald Walker drove to the vicinity of an abandoned mine. (Tr. 3304) Mr. Spring was carrying a .25 automatic pistol, Wagner had a rifle and a .45 automatic pistol, and Walker had a .22 automatic pistol. (Tr. 3306) Wagner instructed Walker to go into the ravine and choose an elk. Walker indicated he would need a rifle, and Wagner told him to choose an elk and then motion to Wagner so that Wagner could shoot the elk. (Tr. 3315) Wagner asked Mr. Spring to shine the flashlight he was carrying into the ravine. Wagner then told Mr. Spring to move the light toward Walker. When Mr. Spring did so, he heard a shot and saw Walker fall. (Tr. 3318) Wagner then shot Walker again. Wagner told Spring to help him drag Walker into the ditch. Mr. Spring testified at trial that he was afraid Wagner would kill him next so he complied. (Tr. 3321) The men then put Walker in the ditch and kicked snow over him. (Tr. 3323)[2]

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[1] "Tr." refers to the folio numbers in the trial transcript. "Supp. Tr." refers to the transcript of the suppression hearing. "JA" refers to the Joint Appendix previously filed with this Court.

[2] At trial the prosecution introduced evidence that in 1976 and 1977 Mr. Spring had told a friend, Robert Beam, that he was planning to kill Walker because he was a "snitch." (Tr. 2904) Mr. Beam admitted

2. In February of 1979, George Dennison of Kansas City, Missouri, was recruited as an informant by Harold Wactor, a law enforcement officer of the Bureau of Alcohol, Tobacco and Firearms (ATF) of the United States Department of Treasury. (JA, p4) Mr. Dennison informed Agent Wactor that Mr. Spring was involved in a scheme to steal firearms, transport them interstate and sell them. (JA, p4) Mr. Dennison also informed Agent Wactor that Mr. Spring had admitted being involved in the homicide of Donald Walker. (JA, p25) On March 23, 1979, Mr. Dennison set up a telephone conversation with Mr. Spring which was tape recorded by ATF agents and during which Mr. Spring implicated himself in the Walker murder. (Tr. 2747-48)

Dennison subsequently arranged a meeting between Mr. Spring and ATF agents in Kansas City. On March 30, 1979, Mr. Spring was arrested during an actual hand to hand sale of stolen firearms to undercover federal agents. (JA, p8) Mr. Spring was in possesion of a .22 caliber pistol at the time of his arrest. (JA, p10)

After the arrest on March 30, Mr. Spring was advised of his rights by ATF agent John Malooly. (JA, p11) Mr. Spring was then transported to the ATF office where he was advised of his rights by Agents Sadowski and Patterson. (JA, p13, 47) Mr. Spring executed a written waiver

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to roughly thirty prior felony convictions (Tr. 2905) and at trial Mr. Spring testified that he had resolved his conflicts with Mr. Walker long before the shooting. (Tr. 3231-55) Mr. Spring testified at trial that he was not aware of Wagner's plan to kill Walker and that he aided Wagner after the murder because of his fear that Wagner would kill him as well. (Tr. 3036-37) Mr. Spring's testimony was impeached by a statement made to Colorado investigators on May 26, 1979, that Mr. Spring had known or had had an idea that Walker would be killed that night. (Tr. 3036-37)

and agreed to answer the agents' questions. (JA, p49) At no time prior to executing the waiver was Mr. Spring advised that he was a suspect in the murder of Donald Walker. (JA, p49) Agents Patterson and Sadowski first questioned Mr. Spring about the weapons charges. Agent Patterson then asked Mr. Spring whether he had a criminal record. Mr. Spring stated that he had a juvenile record involving the shooting of his aunt when he was age ten. (JA, p49) Agent Patterson then asked Mr. Spring whether he had ever shot anybody else. According to Patterson, Mr. Spring "kind of ducked his head and mumbled 'I shot another guy once'." (JA, p50) Agent Patterson then asked Mr. Spring whether he had ever been to Colorado. Mr. Spring stated that he had not. (JA, p50) Agent Patterson then asked Mr. Spring whether he had shot a man named Walker west of Denver and thrown his body into a snowdrift. Agent Patterson testified that "there was a long pause, then [Mr. Spring] kind of ducked his head and said 'no'." (JA, p50)

Donald Walker's body was discovered by Colorado authorities on April 15, 1979. (Tr 2249-52) On May 26, 1979, Colorado law enforcement officers Curtis and Konkel interviewed Mr. Spring who was then in custody in the Jackson County Jail in Kansas City, Missouri. (Supp. Tr. 239-44) The purpose of the interview was to get information about the death of Donald Walker. (Supp. Tr. 242, 310) At the suppression hearing, Detective Curtis stated that he and Konkel had been informed of the results of the March 30th interrogation of Mr. Spring by ATF agents. (Supp. Tr. 283-84) Agent Konkel testified that he told Mr. Spring that he was a suspect in the Walker homicide and had told him what they had learned about the case from ATF investigators. (Supp. Tr. 310) Mr. Spring was advised of his rights and agreed to talk. Dur-

ing questioning, Mr. Spring made oral and written statements that he was present during the elk hunt with Wagner and Walker, and that he held the flashlight while Wagner shot Walker and that he aided Wagner in disposing of the body. (Supp. Tr. 245-310)[3]

[3] On July 13, 1979, following Mr. Spring's guilty plea to the federal firearms offenses and the filing of an information charging him in the Colorado homicide, ATF Agents Wactor and Patterson again interviewed Mr. Spring for the stated purpose of obtaining information concerning the whereabouts of additional firearms and explosives. (JA, p68) The agents advised Mr. Spring of his rights. Mr. Spring acknowledged his rights but declined to sign any form without consulting an attorney. (JA, p68) No effort was made to contact Mr. Spring's lawyer. (Supp.Tr. 146-47) When Mr. Spring agreed to talk, despite his indication that he would not sign a waiver of his rights, the agents began by questioning Mr. Spring about weapons, and then, as on March 30, shifted their questioning to the Walker homicide. Several times during the questioning Mr. Spring responded to questions about Walker's death by saying, "I'd rather not talk about that." (Supp.Tr. 2320-35) When this occurred, the agents returned to the more general questioning, about camping out in caves in Iowa, or some other topic, before asking more questions about the homicide. (Supp.Tr. 233-37) Eventually Mr. Spring admitted that he had been in Colorado with Walker at the time of the shooting and that the gun in his possession at the time of his arrest had belonged to Walker. The agents also got Mr. Spring to agree that "[he], Wagner and Walker went out together and that only [he] and Wagner came back alive." (JA, p19)

The trial court found the July 13th statements admissible but the Colorado Court of Appeals reversed, holding that Mr. Spring had exercised his right to remain silent with regard to the Colorado homicide. *People* v. *Spring*, 671 P.2d 965, 967 (Colo.App. 1983). The Court of Appeals also held that Spring was entitled to renewed *Miranda* warnings when the agents began to question him about the murder, which was a topic not related to the stated purpose of the interview. The Colorado Supreme Court affirmed the ruling of the Court of Appeals but rejected much of that Court's reasoning. The Court first disapproved of the Court of Appeals' adoption of a *per se* rule rendering invalid any waiver of *Miranda* rights when a defendant answers questions, without a renewed *Miranda* advisement, on a subject about which he was not informed before the interrogation. *People* v. *Spring*, 713 P.2d 865, 877 (Colo. 1985) (*See* discussion of the Colorado Supreme Court's holding, at text accompanying n.5, *infra*) The Court held, however, that the July 13th statement must be suppressed because there was no evidence that the "ATF agents made any effort to reaffirm Spring's decision to waive his constitutional rights after he declined to answer questions [regarding the Walker homicide]." *Id.*, 713 P.2d at 878.

Prior to trial, Mr. Spring moved to suppress the statements made to law enforcement officers on the ground that he had not effectively waived his *Miranda* rights. After a hearing held on March 17, 1980, the trial court denied the motion. Despite the fact that Mr. Spring was unaware that the ATF agents intended to question him about the Walker homicide, the court held that Mr. Spring's *Miranda* waiver of March 30, 1979, was made freely, knowingly and intelligently.[4] The court also held that the statements of May 26th followed a proper advisement and waiver of rights pursuant to *Miranda* and were therefore admissible. (JA, p68) Mr. Spring was subsequently convicted at trial of first-degree murder.

In its Opening Brief, the State of Colorado asks this Court to address the issue of the admissibility of the July 13, 1979, statement. Brief of the State of Colorado, at 7 n.4. As the United States Government notes in its brief, however, "[t]his Court limited its grant of certiorari to the first question presented in the petition, and thereby expressly declined to review the state court's determination with respect to this issue. Accordingly, no question regarding the admissibility of the July 13 statement is presented in this case." Brief of the United States, at 4 n.3.

[4] The trial court sustained Mr. Spring's relevancy objection to Mr. Spring's statement "I shot another guy once" and the prosecution chose not to introduce the remainder of the March 30th statement at trial.

3. The Colorado Court of Appeals reversed, holding that Mr. Spring's statements had been admitted in violation of this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *People* v. *Spring*, 671 P.2d 965, 996-97 (Colo.App. 1983). In reaching its decision the Court of Appeals adopted a *per se* rule rendering invalid any waiver of *Miranda* rights when a defendant answers questions, without a renewed *Miranda* advisement, on a subject about which he was not informed before the interrogation:

> The [ATF] agents had a duty to inform Spring that he was a suspect, or to readvise him of his *Miranda* rights, before questioning him about the murder. . . . Because the agents failed to so advise, any waiver of rights in regard to questions designed to elicit information about Walker's death was not given knowingly and intelligently.

Id., 671 P.2d at 966-67. The Court thus concluded that Mr. Spring's statements of March 30th were inadmissible.

The Court also held that the May 26th statement was inadmissible as "fruit of the poisonous tree" of the March 30th statement. The Court concluded that the May 26th statement had to be suppressed because the prosecution had failed to meet its burden of showing that the statement was not the product of Mr. Spring's statement of March 30th. *Id.*, 671 P.2d at 967.

4. The Colorado Supreme Court affirmed but adopted a different analysis from that employed by the Court of Appeals. The Court noted that "the validity of Spring's *[Miranda]* waiver must be determined upon an examination of the *totality of the circumstances* surrounding the making of the statement to determine if the waiver was voluntary, knowing and intelligent. . . . No one factor is always determinative in that analysis. Whether, and to

what extent, a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is simply one factor in the court's evaluation of the total circumstances. . . ." *People* v. *Spring*, 713 P.2d 865, 872-73 (Colo. 1985). (emphasis added) The Court went on to reject the absolute rule proposed by the Court of Appeals:

> We believe it to be more consistent with standards governing the validity of a waiver to consider the extent of the suspect's understanding of the subject matter, and the source of that understanding, simply as factors in the totality of circumstances surrounding the making of a statement. We decline to elevate those considerations into an absolute rule that renders any waiver automatically invalid when the interrogated suspect has not been informed of the subject matter of the questioning prior to its commencement.

Id., 713 P.2d at 874. The Court went on to note that there was no basis to conclude that at the time of the waiver, Mr. Spring could reasonably have expected that the interrogation would extend to the subject of the Colorado homicide. The Court also noted that the record offered little with regard to Mr. Spring's intelligence or acquaintance with the criminal justice system. The Court concluded that "[g]iven these facts it cannot be said that Spring made a voluntary, knowing and intelligent decision to forego counsel and to answer questions concerning the murder." *Id.*[5]

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[5] The Colorado Supreme Court instructed the trial court on remand to determine whether the May 26th statement was the direct fruit of the inadmissible March 30th statement and to hold a hearing on attenuation if necessary. The Court also noted that the prosecution was free to argue the applicability of this Court's decision in *Oregon* v. *Elstad*, 470 U.S. ____, 105 S.Ct. 1285 (1985), to the issue of the admissibility of the May 26th statement. *Spring*, 713 P.2d at 876.

SUMMARY OF THE ARGUMENT

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that the process of in-custody interrogation of persons accused of crime contains inherently compelling pressures which work to undermine the ability of an individual to exercise the rights to remain silent and to counsel. This Court established concrete constitutional guidelines for law enforcement agencies and courts to follow in applying the privilege against self-incrimination. *Miranda* thus required certain specified warnings to be given persons questioned in custody as a prerequisite to the admissibility of statements obtained thereby.

In *Miranda*, this Court acknowledged that a defendant could waive the rights to counsel and to remain silent. Such a waiver must be knowing, intelligent and voluntary and must be made with an understanding of the consequences of waiving the rights. In deciding whether there has been a valid waiver of rights, the totality of the circumstances surrounding the waiver must be assessed. Under the totality of the circumstances standard, the background, conduct and experience of the accused must be evaluated together with the circumstances of the interrogation. Each of these factors, in company with all the surrounding circumstances, is relevant.

In the instant case the Colorado Supreme Court held that one factor to be assessed under the totality approach is the extent to which the defendant is aware of the subject matter of the interrogation prior to its commencement. *People* v. *Spring*, 713 P.2d 865 (Colo. 1985). The decision of the Colorado Supreme Court is correct. A knowing and intelligent decision to waive one's Fifth Amendment rights does not occur in a vacuum. Such a decision is inextricably interwoven with a particular set of facts involving a particular offense. Certainly it stands to

reason that defendant may not be able to knowingly and intelligently make the decision as to whether he wants counsel and to exercise his privilege against self-incrimination if he is unaware of the crime for which he is to be interrogated.

The decision of the Colorado Supreme Court is supported by this Court's decisions in *Fare* v. *Michael C.*, 442 U.S. 707 (1979) and *United States* v. *Washington*, 431 U.S. 181 (1977). In addition, the majority of lower courts that have considered the question have concluded that a suspect's knowledge of the subject matter of the interrogation is a relevant factor under the totality of the circumstances.

The Colorado Supreme Court assessed the totality of circumstances surrounding Mr. Spring's *Miranda* waiver and concluded that it was not knowing and intelligent. The Court noted that Mr. Spring was not advised that he would be questioned about a homicide and that he had no reason to suspect that the federal agents who had just arrested him in Kansas City during a firearms transaction would question him about a murder in Colorado. Moreover, the federal crime which occasioned the interrogation and *Miranda* waiver represented a relatively less serious matter than first-degree murder. The Court noted that the record offered little with regard to Mr. Spring's intelligence or experience with the criminal justice system. The foregoing reveals a careful and thorough analysis of the totality of the circumstances as is required by this Court's prior holdings and the decision of the Colorado Supreme Court should therefore be affirmed.

2. In *Miranda*, this Court held that in order for a suspect's statements to be admissible, the prosecution must show that the suspect voluntarily waived his rights.

This Court condemned any waiver obtained as a result of coercion and also held that "any evidence that the accused was threatened, tricked or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege." 384 U.S. at 476. As with the determination of whether a suspect knowingly and intelligently waived his rights, the voluntariness of a waiver must be assessed by an inquiry into the totality of the circumstances surrounding the interrogation.

In *Miranda*, this Court disapproved of the use of deceptive police practices in obtaining a suspect's confession. This Court condemned a procedure by which police offer suspects 'legal excuses,' thus suggesting that no crime was involved or that the suspect's role in the offense was mitigated. 384 U.S. at 451. This Court also condemned a procedure by which a suspect is identified by persons falsely claiming to have witnessed a crime, thus leading the suspect to misjudge the amount of evidence available to convict. 384 U.S. at 453. This Court's decision implies that police practices which mislead the defendant regarding the seriousness of his factual and legal predicament will vitiate the voluntariness of his *Miranda* waiver and render his subsequent statements inadmissible.

In the instant case the Colorado Supreme Court concluded that during the March 30th interrogation, ATF agents led Mr. Spring to believe that he would be questioned about one crime—the federal firearms offense—but then questioned him about a totally unrelated offense—the Walker homicide. At the time of the interrogation, ATF agents knew that Mr. Spring had confessed his involvement in the Walker homicide to George Dennison. The same agents had participated in tape recording a conversation between Spring and Dennison in which Spring implicated himself in the murder. The

agents then structured their interrogation as to not alert Mr. Spring as to the nature of the offense under investigation. This procedure was clearly intended to mislead Mr. Spring about his true factual and legal predicament in violation of this Court's decision in *Miranda*. Accordingly the Colorado Supreme Court concluded that under the measure of the "totality of the circumstances" Mr. Spring's *Miranda* waiver was not voluntary. That Court's decision, supported by the facts as adduced at the suppression hearing of March 17, 1980, should be affirmed.

ARGUMENT

I. THE COLORADO SUPREME COURT, APPLYING THE *TOTALITY OF THE CIRCUMSTANCES* STANDARD, CORRECTLY CONCLUDED THAT MR. SPRING'S *MIRANDA* WAIVER WAS NOT KNOWING AND INTELLIGENT.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*, 384 U.S. at 467. In order to protect the individual's privilege against self-incrimination[6] this Court established "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.*, 384 U.S. at 441-42. This Court thus held that prior to questioning, a suspect must be advised "that he has the right

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[6] The Fifth Amendment of the United States Constitution provides in pertinent part that:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

to remain silent, that any statement he does make may be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id.*, 384 U.S. at 444.

Like the warnings, a suspect's waiver of his rights is indispensable to the admissibility of the suspect's statements. This Court held that any waiver of rights must be "knowing, intelligent and voluntary," *Id.*, 384 U.S. at 444, and must be made with an understanding of the consequences of waiving the rights. "It is only through an awareness of these consequences that there can be any real understanding and intelligent exercise of the privilege." *Id.*, 384 U.S. at 469.[7]

In deciding whether there has been a valid waiver of rights pursuant to *Miranda*, this Court has held that the totality of the circumstances surrounding the waiver must be assessed including "the particular facts [of the] case, including the background, experience and conduct of the accused." *North Carolina* v. *Butler*, 441 U.S. 369 (1979).[8] *See also Moran* v. *Burbine*, ___ U.S. ___, 106

[7] In *Miranda*, this Court adopted as a standard for waiver the rule enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), that what must be shown is "an intentional relinquishment or abandonment of a known right . . . every reasonable presumption must be indulged against waiver. . . ." *See also Carnley* v. *Cochran*, 369 U.S. 506 (1962).

[8] In adopting the totality of the circumstances test to determine the validity of a *Miranda* waiver, this Court applied a test traditionally discussed in the context of determining the voluntariness of confessions under the Fourteenth Amendment Due Process Clause. *See Procunier* v. *Atchley*, 400 U.S. 446 (1971); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *Frazier* v. *Cupp*, 394 U.S. 731 (1969); *Greenwald* v. *Wisconsin*, 390 U.S. 519 (1968); *Beecher* v. *Alabama*, 389 U.S. 35 (1967); *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Lynum* v. *Illinois*, 372

S.Ct. 1135 (1986) (the "totality of the circumstances" must reveal "the requisite level of comprehension"); *Edwards* v. *Arizona*, 451 U.S. 477 (1981) (waiver depends "upon the particular facts and circumstances surrounding the case"); *Fare* v. *Michael C.*, 442 U.S. 707 (1979) (trial court as the "finder of fact" must look at the circumstances surrounding the interrogation.) Moreover, the inquiry under the totality approach is not limited, rather "it mandates inquiry into all the circumstances surrounding the interrogation." *Id.*, 442 U.S. at 725. "Each of the factors, in company with all of the surrounding circumstances . . . is relevant . . ." *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961) (discussing the totality of the circumstances standard in the context of determining the voluntariness of a confession under the Due Process Clause).

In the instant case, the Colorado Supreme Court held that one factor to be assessed under the totality of the circumstances standard is the extent to which "a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement . . ." *Spring*, 713 P.2d at 873. "[This] awareness may come from many sources, not only from a direct and explicit statement by the interrogating officers, and the awareness can vary from a specific knowledge upon which the questioning will focus to a general understanding of the subject matter in which the interrogators are interested." *Id.*, 713 P.2d at 874.[9]

U.S. 528 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959); *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Gallegos* v. *Nebraska*, 342 U.S. 55 (1951); *Haley* v. *Ohio*, 332 U.S. 596 (1948).

[9] In its brief the Government states that the Colorado Supreme Court adopted a rule which requires that a suspect be "informed in advance of all the subjects that would be covered in the proposed interrogation." Brief of the United States at 13. This statement

The decision of the Colorado Supreme Court is correct. Contrary to the position advanced by the Government in its brief, *see* Brief of the United States at p14, it is clear that a waiver of constitutional rights does not occur in a vacuum. Rather, a knowing and intelligent decision to waive one's Fifth Amendment rights is inextricably interwoven with a particular set of facts involving a particular offense. As this Court noted in *Miranda*, the warnings are "simply . . . the threshold requirement for an intelligent decision as to [their] exercise." 384 U.S. at 468. *See also Fare* v. *Michael C.*, "[T]he question whether the accused waived his rights '*is not one of form*, but rather whether the defendant in fact knowingly, intelligently and voluntarily waived the rights delineated in the *Miranda* case'." 442 U.S. at 724 (citing *North Carolina* v. *Butler*, 441 U.S. at 373) (emphasis added). Certainly it stands to reason that a suspect may not be able to knowingly and intelligently decide whether he wants counsel and whether to exercise his privilege against self-incrimination if he is unaware of the crime for which he is to be interrogated. Knowledge of the offense under investigation is essential "to the free exercise of the right to counsel and [right to remain silent]." *See United States* v. *McCrary*, 643 F.2d 323, 329 at n.9 (5th Cir. 1981) (quoting *Schenk* v. *Ellsworth*, 293 F.Supp. 26, 29 (D.Mont. 1968)). Thus, this Court has similarly held that a suspect's competence, *Tague* v. *Louisiana*, 444 U.S. 469 (1980), youthfulness, intelligence, and prior experience with the police, *Fare* v. *Michael C.*, 442 U.S. at 725-27, are all relevant factors not only in assessing, under the totality approach, whether a defendant has the capacity to understand the warnings given him and the nature of his Fifth Amendment rights, but also whether he comprehends the consequences of waiver.

misrepresents the holding of the Colorado Supreme Court, as the opinion in *Spring* and subsequent decisions of the Court have demonstrated. *See e.g.*, *People* v. *Jones*, 711 P.2d 1220 (Colo. 1986) (Defendant knowingly and intelligently waived his *Miranda* rights with regard to a homicide where he was taken into custody on an auto theft, and although he was not specifically advised that he was a homicide suspect, the auto was owned by the murder victim and the defendant "could have reasonably expected to be asked about the circumstances surrounding his ownership and possession of the car.") It is therefore clear that in *Spring*, the Colorado Supreme Court held only that the suspect's awareness of the subject matter of the interrogation is one factor to be assessed under the totality approach and that such an awareness can come from sources other than law enforcement officials.

The Colorado Supreme Court's holding is also supported by this Court's decision in *United States* v. *Washington*, 431 U.S. 181 (1977). In *Washington*, the defendant, in a noncustodial setting,[10] received the *Miranda* warnings prior to testifying before a grand jury. The defendant argued that he should also have been advised that he was a potential defendant. In rejecting the defendant's claim that additional warnings were required, this Court discussed the fact that at the time he received the *Miranda* warnings the defendant was aware that the was a suspect in the offense under investigation. This Court's opinion suggests that such awareness may be a relevant factor in the ability of a particular defendant to knowingly and intelligently exercise his rights:

> [The] events here clearly put respondent on notice that he was a suspect in the motorcycle theft. He knew that the grand jury was investigating the theft

[10] The Court noted in *Washington* that it was unclear—given, presumably, the noncustodial nature of the proceedings—whether the *Miranda* warnings were in fact required. 431 U.S. at 182.

> and that his involvement was known to the authorities. Respondent was made abundantly aware that his . . . version of the events had been disbelieved by the police officer, and that his friends . . . were to be prosecuted for theft. . . . In sum, by the time he [received the *Miranda* warnings and] testified respondent knew better than anyone else of his potential defendant status.

Id., 431 U.S. at 181-82.

In *Fare* v. *Michael C.*, 442 U.S. at 707, this Court considered the respondent's awareness of the nature of the offense in affirming the validity of his *Miranda* waiver. In holding that the respondent had validly waived his *Miranda* rights this Court noted the respondent's extensive experience with the juvenile justice system and the fact that the *respondent was aware he was being questioned in connection with a murder. Id.*, 442 U.S. at 726.[11]

Similarly, the vast majority of lower courts that have considered the question have concluded that a suspect's knowledge of the subject of the interrogation is a relevant factor under the totality of the circumstances. *See e.g., United States* v. *Burger, 728 F.2d 140 (2nd Cir. 1984); Carter* v. *Garrison*, 656 F.2d 68 (4th Cir. 1981); *United States* v. *McCrary, supra; United States* v. *Dickerson*,

[11] *Cf. Estelle* v. *Smith*, 451 U.S. 454 (1981). In *Estelle*, this Court held that a defendant may not be compelled to respond to a psychiatrist if his statement can be used against him at a capital sentencing proceeding. The defendant in *Estelle* had not been advised of his *Miranda* rights. This Court also noted that the defendant was unaware of the "possible use of his [statement]" in the penalty phase. 451 U.S. at 468. This Court's opinion indicates that an awareness of this particular consequence may be a relevant factor in the ability of a particular defendant to make a knowing and intelligent decision to exercise his rights.

413 F.2d 1111 (7th Cir. 1969); *United States* v. *Gomez*, 495 F.Supp. 992 (S.D.N.Y. 1979); *Schenk* v. *Ellsworth, supra; Lane* v. *State*, 247 Ga. 19, 273 S.E.2d 397 (1981); *Armour* v. *State*, 479 N.E.2d 1294 (Ind. 1985); *Edwards* v. *State*, 227 Kan. 723, 608 P.2d 1006 (1980); *State* v. *Tribou*, 488 A.2d 472 (Me. 1985); *Commonwealth* v. *Madeiros*, 377 Mass. 319, 479 N.E.2d 1371 (1975); *State* v. *Beckman*, 354 N.W.2d 432 (Minn. 1984); *State* v. *Jones*, 484 A.2d 553 (N.H. 1984); *State* v. *Moore*, 34 Or.App. 649, 579 P.2d 320 (1978); *Commonwealth* v. *Brown*, 341 Pa.Super 138, 491 A.2d 189 (1985); *State* v. *Goff*, 289 S.E.2d 473 (W.Va. 1982)[12]

In its brief, the Government contends that this Court's decisions in *Moran* v. *Burbine*, 106 S.Ct. 1135, and *Oregon* v. *Elstad*, 470 U.S. ___, 105 S.Ct. 1285 (1985), compel the rejection of the Colorado Supreme Court's decision that a suspect's awareness of the offense under investigation is a relevant factor under the totality approach in determining the validity of his *Miranda* waiver. Brief of the United States at 17-18. This assertion is erroneous. In *Moran*, this Court held that the failure of law enforcement officials to inform the defendant of an attorney's phone call did not deprive him of information essential to his ability to knowingly waive his right to the

[12] In its brief, the State of Colorado cites a number of lower court decisions holding that law enforcement officials are not required to supplement the *Miranda* warnings with an advisement as to the nature of the offense under investigation. Brief of the State of Colorado at 15 n.5. Only three of the cases cited which address the issue, however, can be read as stating that an awareness of the offense under investigation is not a relevant factor under the totality approach. *See People* v. *MacDonald*, 61 A.D.2d 1081, 403 N.Y.S.2d 337 (1978); *People* v. *Pereira*, 309 N.Y.S.2d 901, 26 N.Y.2d 265, 258 N.E.2d 194 (1970); *State* v. *Woods*, 117 Wis.2d 701, 345 N.W.2d 457 (1984).

presence of counsel. In *Moran*, however, the defendant was fully informed of his right to counsel and his right to remain silent by law enforcement officials and information regarding the phone call could have no bearing on his ability to intelligently and "knowingly relinquish [his] constitutional right[s]." *Moran*, 106 S.Ct. at 1142. The respondent in *Moran*, "[comprehended] . . . the full panoply of the rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them." *Id.*, 106 S.Ct. at 1141. By contrast, Mr. Spring's lack of awareness about the nature of the offense under investigation critically impaired his ability to comprehend the consequences of waiver and make a knowing and intelligent decision to relinquish his rights.

In *Oregon* v. *Elstad*, 105 S.Ct. 1285, this Court rejected the defendant's claim that his *Miranda* waiver was not fully informed because he had not received an additional warning telling him that his previous confession was inadmissible. In *Elstad*, however, this Court noted that "[i]n many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession is obtained. . . . Police officers are ill equipped to pinch-hit for counsel, construing the murky and difficult questions of when "custody" begins or whether a given unwarned statement will ultimately be held inadmissible." *Id.*, 105 S.Ct. at 1297. It must first be noted that nothing in the Colorado Supreme Court's decision imposes a duty on law enforcement officials to provide additional admonitions beyond those required by *Miranda* to a potential defendant. (*See* the discussion of the Colorado Supreme Court's holding at text accompanying n.5, *supra*). Moreover, in contrast to this Court's decision in *Elstad*, if the ATF agents in the instant case wished to assure that Mr. Spring's lack of

awareness would not be assessed as a critical factor under the totality standard, those same agents had information regarding the Walker homicide for which Mr. Spring was eventually interrogated, intended to interrogate Mr. Spring regarding that offense, and could have easily communicated that information to Mr. Spring.

In its brief, the Government argues that the rationale underlying the decision of the Colorado Supreme Court could be extended to require police officers to provide a suspect with all the information possessed by police officers that might be relevant to the calculation of his self-interest. Thus, the Government asserts, police officers would be required to inform a suspect of "the quality and quantity of information already possessed by the police concerning the suspect's involvement in the offense . . . the legal elements of the offense, [and] the likely penalties. . . ." Brief of the United States at 20-21. As discussed above, however, nothing in the Colorado Supreme Court's decision requires police officers to provide additional warnings besides those required by *Miranda* to a defendant. Rather, a defendant's knowledge of the nature of the offense under investigation is simply one factor to be assessed under the totality of the circumstances. The Colorado Supreme Court's decision reflects the concern that unless a suspect has some information about the offense under investigation he may be unable to make a knowing and intelligent decision whether to request an attorney who could counsel the suspect regarding his legal predicament and the advisability of making a statement.

The Colorado Supreme Court assessed the totality of circumstances surrounding Mr. Spring's Miranda waiver. The Court properly considered Mr. Spring's awareness of the nature of the offense as a factor in its assessment. The

Court noted that Mr. Spring was "not advised that he would be questioned about the Colorado homicide," *Spring*, 713 P.2d at 874, and that Spring "had no reason to suspect that the federal agents who had just arrested him in Kansas City during a firearms transaction . . . would question him about a murder . . . in Colorado not only in a distant jurisdiction but outside of the normal purview of the [ATF] . . . and totally unrelated to the transaction that gave rise to the arrest. . . ." *Id.* Moreover, "the federal crime that occasioned the interrogation [and waiver] . . . represented a relatively less serious matter than first degree murder." *Id.* The Court noted that the record offered "little with regard to Mr. Spring's intelligence or acquaintance with the criminal justice system." *Id.* The foregoing reveals a careful and thorough analysis by the Colorado Supreme Court of the totality of the circumstances as is required by this Court's decisions in *Fare* v. *Michael C.*, and *North Carolina* v. *Butler*, and its decision should therefore be affirmed by this Court.

II. THE COLORADO SUPREME COURT, APPLYING THE *TOTALITY OF THE CIRCUMSTANCES* STANDARD, CORRECTLY CONCLUDED THAT MR. SPRING'S *MIRANDA* WAIVER WAS NOT VOLUNTARY.

In *Miranda*, this Court held that in order for a suspect's statements to be admissible, the prosecution must show that the suspect did in fact "voluntarily waive his privilege." 384 U.S. at 476. This Court thus condemned any waiver obtained under coercive circumstances:

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that an accused did not validly waive his rights. In these

> circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.

Id. This Court also held that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege." *Id.* As with the determination of whether a suspect knowingly and intelligently waived his rights, the voluntariness of a waiver must be assessed by an inquiry into the "totality of the circumstances surrounding the interrogation." *Fare* v. *Michael C.*, 442 U.S. at 725.[13]

In *Miranda*, this Court disapproved of the use of deceptive police practices in obtaining a suspect's confession. This Court condemned interrogation practices by which police offer suspects 'legal excuses', thus suggesting that no crime was involved or perhaps that the suspect's role in the offense was mitigated. 384 U.S. at 451. This Court also condemned a procedure by which a suspect is identified by persons falsely claiming to have witnessed a crime, thus leading the suspect to misjudge the amount of evidence available to convict him. 384 U.S. at 453. This Court's discussion implies that police practices which mis-

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[13] In the recent case of *Moran* v. *Burbine*, this Court reiterated the standards for determining waiver under *Miranda:*

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances' surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

106 S.Ct. at 1141.

lead the defendant regarding the seriousness of his legal or factual predicament will vitiate the voluntariness of his *Miranda* waiver and render his subsequent statements inadmissible.[14]

In the instant case, the Colorado Supreme Court concluded that during the March 30th interrogation, ATF agents Sadowski and Patterson "led . . . [Mr. Spring] to believe that he would be questioned about one crime [the federal firearms offense] but then interrogated him about a totally unrelated offense [the Walker homicide]." 713 P.2d at 873. At the time of the March 30th interrogation, Agents Sadowski and Patterson knew that Mr. Spring had confessed his involvement in the Walker homicide to George Dennison. Moreover, the agents had participated in tape recording a conversation between Mr. Spring and Mr. Dennison in which Mr. Spring implicated himself in the murder. The agents thus clearly knew that Mr. Spring had been involved in a much more serious matter than the

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[14] In pre-*Miranda* cases this Court, although avoiding any *per se* rule of inadmissibility, has similarly routinely condemned the use of police trickery and deception in obtaining confessions. Thus in *Lynum* v. *Illinois*, 372 U.S. 528, this Court held that the misrepresentation by police officers that the petitioner could be deprived of state financial aid for her dependent children if she failed to cooperate with police authorities rendered her subsequent statement inadmissible. In *Spano* v. *New York*, 360 U.S. 315, this Court condemned the misrepresentation by a police officer, who was also a friend of the defendant, that he would lose his job if the defendant failed to cooperate. In *Leyra* v. *Denno*, 347 U.S. 556 (1954), this Court held impermissible the use of a police psychiatrist trained in hypnosis to obtain a confession where the psychiatrist was introduced to the defendant as a "doctor" brought to give him medical relief from a painful sinus. *See also Frazier* v. *Cupp*, 394 U.S. 731 (police officer's misrepresentation that the defendant's accomplice had confessed was a relevant factor under the totality of the circumstances in assessing whether the defendant's confession was voluntary).

firearms transaction for which he had just been arrested. The agents then structured their interrogation to obtain incriminating information in such a fashion as to not "tip off" Mr. Spring as to the nature of the offense under investigation. Thus as the Colorado Supreme Court noted, "nothing about the questions concerning the federal firearms crimes or about Spring's past criminal record" or even "whether [Spring] had ever been in Colorado" suggested the true "topic of inquiry." *Spring*, 713 P.2d at 874. This interrogation procedure was clearly intended to mislead Mr. Spring about the nature of the inquiry and his true legal predicament in violation of this Court's decision in *Miranda*. Accordingly, the Colorado Supreme Court concluded that under the measure of the "totality of the circumstances" Mr. Spring's *Miranda* waiver was not voluntary.[15]

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[15] The same deceptive practices employed by ATF agents in their March 30th interrogation were used on July 13, 1979. *See* n.3, *supra*. During this interview ATF agents first informed Mr. Spring that they were questioning him in order to obtain information concerning the whereabouts of additional firearms and explosives. *Spring*, 713 P.2d at 876. The agents then shifted the focus of their interrogation to the Walker homicide. On three occasions Mr. Spring indicated he did not wish to answer questions regarding the murder. On each occasion the agents shifted their questioning to firearms or some other topic including camping out in Iowa before returning to the topic of the homicide. (Supp.Tr. 233-37) Through use of this persistent and improper interrogation technique the agents were able to obtain incriminating information.

A number of lower courts have held that deceptive police tactics similar to that employed by ATF agents on March 30th render a *Miranda* waiver involuntary. *See e.g.*, *People* v. *Groleau*, 44 Ill.App.3d 807, 358 N.E.2d 1192 (1976) (Defendant was told by police that the victim, who was actually dead, was either in the hospital or missing); *Commonwealth* v. *Jackson*, 386 N.E.2d 15 (Mass. 1979) (Defendant falsely told by law enforcement officials that his girlfriend

In its brief the Government contends that this Court's decision in *Moran* v. *Burbine*, 106 S.Ct. 1135, compels the rejection of the Colorado Supreme Court's conclusion that Mr. Spring's *Miranda* waiver was not voluntary. Brief of the United States, at 25. This assertion is incorrect. As discussed above, *see* Respondent's Argument I, in *Moran*, law enforcement officials failed to inform the defendant of a phone call placed by an attorney retained by the defendant's sister. In rejecting Defendant's claim that the actions of the police constituted "trickery" which rendered his *Miranda* waiver involuntary, this Court noted that:

> Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of the rights and the consequences of abandoning them.

Id., 106 S.Ct. at 1142. In *Moran*, the defendant was aware of his right to counsel and this Court thus concluded that the failure to inform the defendant of the phone call could have no effect on the defendant's ability to voluntarily waive his rights. By contrast, the police trickery employed in this case impacted on Mr. Spring's ability to intelligently exercise his rights, *see* Respondent's Argument I, and thus constituted deception which vitiated Mr. Spring's *Miranda* waiver.

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confessed to the crime). *See also*, White, *Police Trickery in Inducing Confessions*, 127 U.Pa.L.Rev. 581, 611-614 (1979), Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 Wash.U.L.Q. 275, 318-19. (Misrepresentations of the nature of the offense under investigation should render a *Miranda* waiver involuntary).

ATF agents employed deceptive police practices and misled Mr. Spring into waiving his *Miranda* rights on March 30, 1979. The Colorado Supreme Court, assessing the "totality of the circumstances" correctly concluded that Mr. Spring's waiver was not voluntary. That Court's decision, supported by the facts as adduced at the suppression hearing of March 17, 1980, should be affirmed.

CONCLUSION

The judgment of the Supreme Court of Colorado should be affirmed with respect to the issue on which this Court granted certiorari.

Respectfully submitted,

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No. 85-1517

In The

Supreme Court of the United States

October Term, 1986

THE STATE OF COLORADO,

Petitioner,

vs.

JOHN LEROY SPRING,

Respondent.

On Certiorari to the Supreme Court of the State of Colorado

REPLY BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

No. 85-1517

—o—

In The

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—o—

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—o—

REPLY BRIEF

—o—

The respondent has paid the State the subtle compliment of failing to even attempt to refute any of the arguments raised in the Brief for Petitioner. Instead, the respondent has attempted to blunt the significance of the Colorado Supreme Court's holding. The respondent argues that the Colorado Supreme Court did not *require* the police to advise suspects of the subject of interrogation, but simply held that the failure to do so was one factor to consider in the "totality of the circumstances" (Respondent's Brief at 9, 18, 19).

First, on this record, it is clear that the agent's failure to advise the respondent that they would question him

about the Walker homicide was not simply *a* factor in the totality of the circumstances, but the dispositive factor. As it now stands, the law of Colorado is that ignorance of the charges vitiates an otherwise valid waiver of fifth amendment rights. More fundamentally, by denying that the Colorado Supreme Court's holding requires the police to advise a suspect of the subjects about which they propose to question him, the respondent misapprehends the *impact* of the Colorado Supreme Court's opinion. A failure to advise a suspect of the subject of interrogation may jeopardize the admissibility of any statement that he makes. Police officers in the field will no longer know exactly what information must be provided to suspects before a valid waiver may occur. Finally, the respondent's reasoning is fundamentally flawed, because whether or not a suspect has been advised of the subject of interrogation is not even a factor to consider. Logically, the fact that the suspect is not aware that the police know more than he thinks they do is not relevant in determining whether he understands his rights.

The respondent argues that a suspect cannot knowingly and intelligently decide whether he wants counsel, or whether he wishes to exercise his privilege against self incrimination, if he is unaware of the crime about which he is to be interrogated. It is clear from this argument that the respondent equates "knowing and intelligent" with "wise," but neither the Fifth Amendment or this Court has ever required a waiver to be wise. *Oregon v. Elstad*, 470 U.S. 298 (1985). It is "knowing and intelligent" if the suspect understands his rights, and understands that the police can and will use any statements against him.

The state agrees with the respondent that the validity of a waiver of rights pursuant to *Miranda* must be assessed in light of the "totality of the circumstances." *Moran v. Burbine*, 106 S. Ct. 1135 (1986); *see North Carolina v. Butler*, 441 U.S. 369 (1979). However, the respondent parades the phrase "totality of the circumstances" throughout his brief as though it defines the issue of just what evidence is relevant to prove a waiver. The phrase was never meant to *define* relevance, but only to direct reviewing courts to *consider* all relevant evidence in determining the validity of a waiver. *North Carolina v. Butler, supra.*

The only evidence which is relevant is that which tends to prove or disprove that the suspect understood his rights, understood that his statements could and would be used against him, and chose to speak. Thus, under the "totality of the circumstances," the suspect's personal characteristics and background are relevant in determining whether he was able to and did understand his rights. The history of the arrest and station house processing may also be relevant. However, factors which have *no* bearing on the issue of whether he understood his rights are not. The rule that a waiver must be assessed in light of the "totality of the circumstances" does not support the respondent's position.

The respondent is encouraged by *United States v. Washington*, 431 U.S. 181 (1977) and *Fare v. Michael C.*, 442 U.S. 707 (1979), because in both of these cases this court noted in its opinion that the respondent was aware of the nature of the charges under investigation (Respondent's Brief at pp. 15, 16). However, in neither case is there any suggestion that the court regarded this knowl-

edge as anything more than an historical fact. Indeed, the reasoning of the two decisions is antithetical to the extravagant extension of *Miranda* that the respondent urges. For example, in *Washington*, this court stated flatly:

> [M]iranda does not require that any additional warnings be given simply because the suspect is a potential defendant . . ."

431 U.S. at 188. The *Miranda* warnings, without more, provided sufficient information in *Washington* to a suspect who purportedly did not even know that he was a potential defendant. The respondent's reliance on *Washington* and *Fare v. Michael C.* is misplaced.

The respondent argues that the ATF agents "employed deceptive police practices" and "misled" him into waiving his rights involuntarily (Respondent's Brief, p. 25). However, the voluntariness of this waiver was never an issue in the state courts. Although the Colorado Supreme Court's final ruling was expressed in the conventional formula of a "voluntary, knowing and intelligent" waiver of rights, the court discussed in its opinion only whether the waiver was knowing and intelligent. The Colorado Supreme Court never found or noted in passing any "deception" on the part of the federal agents who obtained the respondent's initial statement, and the trial court specifically found that there was none (Petition for Writ of Certiorari at 3-A).

The fact that the police do not tell a suspect all the information known to them is not deceptive. Even if the decision to withhold is deliberate, this is not the kind of deception forbidden by *Miranda*. *Moran v. Burbine, supra; cf. Frazier v. Cupp*, 394 U.S. 731 (1969) (under the pre-

Miranda "old voluntariness standard," an actual misrepresentation that the codefendant had confessed did not render the defendant's confession involuntary). Deception which obscures the meaning of the *Miranda* warnings themselves will violate *Miranda*. *Cf. Edwards v. Arizona*, 451 U.S. 477 (1981) (where the defendant was told that he "had to" talk with the police). However, the police do not violate *Miranda* simply by failing to inform a suspect about matters irrelevant to his understanding of his rights.

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CONCLUSION

Miranda requires that a suspect in custody must be made aware of his rights. It does not require that he be given any information to aid him in assessing the relative gravity of his situation or the wisest course of action under the "totality of the circumstances." The petitioner again requests that the case be reversed.

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No. 85-1517

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF COLORADO, PETITIONER

v.

JOHN LEROY SPRING

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent's voluntary statements should be suppressed under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), on the ground that the law enforcement officers' failure to identify in advance the crimes that would be the subjects of the interrogation rendered respondent's waiver of his *Miranda* rights ineffective.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1517

STATE OF COLORADO, PETITIONER

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JOHN LEROY SPRING

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The issue in this case is whether respondent's waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was invalid because the law enforcement officers did not inform respondent of the crimes that would be the subjects of the proposed interrogation. The Court's analysis and resolution of the question whether police must provide this information in addition to the warnings prescribed in *Miranda* is likely to have an effect upon the conduct of interrogations by federal law enforcement officers

and the admission of voluntary statements in federal criminal prosecutions.

STATEMENT

1. In February 1979, Harold N. Wachtor, III, a law enforcement officer employed by the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury, learned that respondent and several other persons were involved in a scheme to steal firearms and resell them in another state. Agent Wachtor recruited George Dennison, one of the members of the group, as a government informant. In addition to revealing the details of the firearms scheme, Dennison told Wachtor that respondent once admitted killing a man during a hunting trip in Colorado. Pet. App. 2A, 7C; Supp. Tr. 7-10, 31, 40.[1]

Dennison subsequently reported to Wachtor that respondent had obtained some firearms and was looking for a buyer. Pursuant to Wachtor's instructions, Dennison arranged a meeting between respondent and undercover ATF agents that was held on March 30, 1979.[2] The agents reached an agreement with respondent for the purchase of the firearms; respondent and one of his confederates were arrested as they transferred the firearms to the undercover agents' automobile. Respondent was found to be in possession of a .22 caliber pistol at the time of his arrest. Pet. App. 1A-2A, 7C; Supp. Tr. 9-11, 18.

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[1] "Supp. Tr." refers to the transcript of the suppression hearing conducted on March 17, 1980; "Tr." refers to the trial transcript.

[2] In the course of a telephone conversation with Dennison concerning the sale of the firearms, respondent implicated himself in the hunting trip murder. That conversation was tape-recorded by ATF agents. Pet. App. 8C.

One of the ATF agents read the *Miranda* warnings to respondent just after respondent was placed under arrest. Later that day, at the ATF office, respondent again was advised of his *Miranda* rights by ATF Agents Patterson and Sadowski. He agreed to answer the agents' questions and executed a written form acknowledging and waiving his rights. Pet. App. 3A, 8C; Supp. Tr. 14-16, 20, 66-67. The agents first interrogated respondent about the firearms transactions. They then inquired whether respondent had a criminal record; respondent stated that he had a juvenile record involving the shooting of his aunt. Agent Patterson asked respondent whether he had ever shot anyone else. Pet. App. 3A, 8C-9C; Supp. Tr. 69, 74-77. Respondent "kind of ducked his head and mumbled 'I shot another guy once.'" Supp. Tr. 69; see also Pet. App. 3A, 9C. Respondent stated in response to subsequent questions that he had never been to Colorado and that he had not killed Donald Walker—the victim of the hunting trip shooting. Pet. App. 3A, 9C; Supp. Tr. 69.

On May 26, 1979, while he was in custody on charges growing out of the firearm sales scheme, respondent was interviewed by Colorado law enforcement officers concerning the murder of Donald Walker. Prior to the commencement of the questioning, respondent was advised of his *Miranda* rights, and he executed a written acknowledgment and waiver of those rights. Respondent admitted that he had accompanied Walker and Donald Wagner on a deer hunt, that he held the flashlight while Wagner shot Walker, that either respondent or Wagner emptied Walker's pockets, that respondent aided Walker in disposing of the body, and that respondent later lied about Walker's whereabouts. Respondent subse-

quently signed a written statement prepared by one of the officers, which summarized the interview. Pet. App. 4A-5A, 17C-18C; Supp. Tr. 80-90, 98-103.[3]

[3] Approximately six weeks later, after respondent entered his guilty plea to the federal firearms offenses and an information charging him with murder had been issued in Colorado, respondent again was interviewed by the ATF agents. At that interview, on July 13, 1979, the agents administered the *Miranda* warnings and respondent indicated that he understood his rights. Respondent stated that he would not sign any forms without the advice of his lawyer, but he agreed to answer the agents' questions. Respondent answered a number of inquiries concerning the location of a variety of firearms and explosives. The questioning then turned to the Walker murder. In response to several questions, respondent said, "I'd rather not talk about that," but he then admitted that he had been in Colorado with Walker at the time of the murder and that the gun in his possession at the time of his arrest previously had belonged to Walker. Respondent agreed that "[he], Wagner and Walker went out together and that only [he] and Wagner came back alive." Pet. App. 5A-6A, 19C-20C; Supp. Tr. 22-28, 32-35, 70-73.

The trial court found that these statements were admissible (Pet. App. 6A-7A), but the Colorado intermediate appellate court disagreed, holding that respondent had "invoke[d] his right to silence as to the homicide" when he at first declined to answer questions relating to that subject (*id.* at 4B). The Colorado Supreme Court unanimously concluded that the statements should be suppressed because the agents did not make "any effort to reaffirm [respondent's] decision to waive his constitutional rights after he declined to answer particular questions" and failed to ascertain whether respondent intended to exercise his privilege against compelled self-incrimination with respect to all questions relating to the Walker murder. *Id.* at 23C-24C; see also *id.* at 35C. This Court limited its grant of certiorari to the first question presented in the petition, and thereby expressly declined to review the state court's determination with respect to this issue. Accordingly, no question regarding the admissibility of the July 13 statements is presented in this case.

2. Respondent was charged with first degree murder in connection with the death of Donald Walker. Prior to trial, respondent moved to suppress the statements he made in the interviews on the ground that he had not effectively waived his *Miranda* rights. The trial court denied respondent's motion (Pet. App. 1A-9A). With respect to the March 30 interview, the court found (*id.* at 3A) that

> this questioning was conducted while [respondent] was in lawful custody, pursuant to a valid arrest; that [respondent] had been properly advised of his rights and was aware of his right to remain silent, to have Counsel present during interrogation, to stop the interrogation at any time; and that his responses to the interrogation were made freely, voluntarily and intelligently: that there was no element of duress or coercion used to induce [respondent's] statements * * *.

The court noted that respondent was not specifically advised that the questioning would touch upon the Colorado murder, but it found that "the questions themselves suggested the topic of inquiry. * * * [They] were not designed to gather information relating to a subject that was not readily evident or apparent to [respondent]" (*id.* at 4A).

The trial court also concluded that respondent's statements during the May 26 interview were admissible. The court observed that respondent was advised of his rights, executed a waiver form, did not decline to answer any questions, and signed a written statement summarizing the interview. The court concluded that the statement "was made freely, and intelligently, after [respondent was] properly and fully advised of his rights." Pet. App. 4A-5A.

Respondent was found guilty of first degree murder, and he appealed to the Colorado intermediate appellate court. That court reversed respondent's conviction by a divided vote, holding that respondent's statements had been admitted into evidence in violation of this Court's decision in *Miranda* v. *Arizona*, *supra* (Pet. App. 1B-7B). The court stated that "[a]n advisement of the privilege against self-incrimination and of [the] right to counsel is sufficient if the accused fully knows the general nature of the crime involved. If knowledge of the crime is withheld, a suspect cannot intelligently make the decision as to whether he wants counsel" (*id.* at 3B (citation omitted)). Since the agents did not advise respondent that the questioning in the March 30 interview would relate to the Colorado murder, the court concluded that "any waiver of rights in regard to questions designed to elicit information about [the murder] was not given knowingly or intelligently" (*ibid.*). None of respondent's March 30 statements had been introduced at trial, but the appellate court did not note that fact.[4] It concluded that the reversal of respondent's conviction was required because respondent's March 30 *Miranda* waiver was invalid (Pet. App. 3B).

The court stated that the May 26 statement was not admissible because it was a "fruit" of respondent's March 30 statements. The May 26 statement had to be suppressed, the court concluded, because the State had failed to show that "the [May 26]

[4] The trial court had ruled that respondent's statement that he "shot another guy once" was not relevant (Tr. 578-579); the prosecution chose not to offer respondent's statement denying that he had committed the Walker murder.

statement was not the product of [respondent's] prior incriminating statements" (Pet. App. 4B).

One judge dissented. He concluded that at the time of the March 30 interview respondent was "fully aware that his activities surrounding the possession and sale of stolen firearms were the basis for his arrest and the agents' investigation" (Pet. App. 6B). Because the .22 pistol found on respondent was the weapon that had been taken from Walker at the time of his death, the dissenting judge concluded that questions regarding the source and the use of the pistol were foreseeable, and that respondent's *Miranda* waiver on March 30 was therefore valid and proper. The dissenting judge further concluded that respondent's May 26 *Miranda* waiver was valid as well (Pet. App. 6B-7B).

3. The Supreme Court of Colorado affirmed by a divided vote (Pet. App. 1C-35C). Observing that "[i]t seems likely that a suspect's decision whether to consult with an attorney will often be influenced by the seriousness of the matter underlying the interrogation" (*id.* at 12C), the majority stated that "[o]ne factor often considered crucial to a court's determination as to the validity of a waiver * * * is the extent of the suspect's knowledge concerning the likely subjects and scope of the prospective questioning" (*id.* at 13C). The court concluded that "an examination of the totality of the circumstances is proper and necessary to determine, among other things, the extent of the suspect's awareness of the subject matter of the investigation and the impact of this awareness, or lack of awareness, on the suspect's decision to waive his constitutional rights" (*ibid.*).

The court found that, in the present case, "the absence of an advisement to [respondent] that he would

be questioned about the Colorado homicide, and the lack of any basis to conclude that at the time of the execution of the waiver, he reasonably could have expected that the interrogation would extend to that subject, *are* determinative factors in undermining the validity of the waiver" (Pet. App. 15C (emphasis in original)). The court therefore concluded that respondent did not make a "voluntary, knowing and intelligent waiver of [his] rights" in connection with the March 30 interview (*id.* at 17C).

The court considered the admissibility of the March 30 statements to be relevant because the court believed that its finding of a violation of *Miranda* on March 30 might require the suppression of respondent's May 26 statement. Pet. App. 10C-11C. The court held that the May 26 statement would be inadmissible if it was "the direct fruit of the March 30 statement" (*id.* at 19C), and it directed the trial court to resolve that issue on remand.[5]

Two justices dissented. They noted that respondent had been advised of his rights as required by *Miranda* and had indicated that he understood those rights. The dissenting justices stated that "a waiver of *Miranda* rights should never be held invalid simply because the suspect is not informed or does not know in advance of all matters that are under investigation and will be the subject of interrogation" (Pet. App. 33C).

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[5] The Colorado Supreme Court also left for consideration on remand the State's argument that the May 26 statement was admissible under *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985), regardless of the admissibility of the March statements (see Pet. App. 19C, 30C n.6).

SUMMARY OF ARGUMENT

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court prescribed a set of "procedural safeguards" designed to protect persons suspected of criminal wrongdoing from what the Court viewed as the inherent compulsion of custodial interrogation, and thereby to enable such persons freely to exercise their privilege against compelled self-incrimination. *Miranda* did not prohibit all custodial interrogation; on the contrary, it established a specific procedure by which a suspect could waive his privilege and agree to answer questions posed by the police.

The law enforcement officers in the present case followed with precision the procedures set forth by this Court in *Miranda*. They recited the *Miranda* warnings, ensured that respondent understood his rights, and obtained from respondent a written waiver of those rights. The court below, however, treated the officers' compliance with *Miranda* as the beginning rather than the end of its inquiry. The court concluded that respondent's waiver was invalid because he had not been supplied with a supplement to the *Miranda* warnings—a description of the criminal activity that was to be the subject of the proposed interrogation. This Court's recent decisions in *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), and *Oregon* v. *Elstad*, No. 83-733 (Mar. 4, 1985), conclusively demonstrate that the Colorado Supreme Court erred by requiring the police to provide respondent with information other than that contained in the *Miranda* warnings.

The first inquiry in evaluating the validity of a *Miranda* waiver is whether the suspect acted "with a full awareness both of the nature of the right being abandoned and the consequences of the decision to

abandon it" (*Moran*, slip op. 7). This test plainly is satisfied as long as the suspect is supplied with the information contained in the *Miranda* warnings. The warnings inform the suspect of his right to remain silent and caution him that any statement he makes can be used against him; a suspect who is aware of the information contained in the warnings thus possesses all the information necessary for an effective waiver.

The Colorado Supreme Court concluded that a suspect also should be told of the subject matter of the interrogation because that information might influence the suspect's decision whether to waive his right to remain silent. But this Court repeatedly has held that *Miranda*'s sole purpose is to ensure the voluntariness of a suspect's decision to speak or remain silent; it is not a guarantee that the suspect's decision will comport with his informed self-interest. Law enforcement officers therefore are not required to provide a suspect with any and all information that he might find helpful in deciding whether to speak or remain silent.

Such a novel rule would upset the balance that this Court has struck between the competing interests implicated in custodial interrogation. The rule would not further the Fifth Amendment interests protected by *Miranda*, because the additional information is not necessary to enable a suspect to exercise his privilege against compelled self-incrimination. Yet the rule would discourage voluntary confessions and thereby undermine society's compelling interest in apprehending and convicting persons who have engaged in criminal activity. Moreover, the principle applied by the court below would greatly reduce the clarity of *Miranda*'s waiver procedures and, as a result, increase the difficulties facing police officers charged with administering the *Miranda* rule.

Respondent's waiver also satisfied the second requirement for an effective *Miranda* waiver because it was "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception" (*Moran*, slip op. 7). No physical or psychological pressure was applied to obtain the waiver. In addition, because the law enforcement officers did not deceive respondent with respect to the information conveyed in the *Miranda* warnings, but simply withheld information that *Miranda* did not require them to provide, the waiver was not the product of impermissible police deception. For these reasons, respondent's waiver of his *Miranda* rights should be upheld.

ARGUMENT

RESPONDENT'S VOLUNTARY STATEMENTS SHOULD NOT BE SUPPRESSED

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that custodial interrogation by law enforcement officers generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (384 U.S. at 467). "To combat this inherent compulsion, and thereby protect the Fifth Amendment privilege against self incrimination, *Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused" (*Moran* v. *Burbine*, No. 85-1485 (Mar. 10, 1986), slip op. 6). The Court held that, prior to any questioning of a suspect, a law enforcement officer must inform the suspect "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed" (*Miranda*, 384 U.S. at 444).

Miranda further provided that a suspect may waive his right to remain silent and agree to submit to questioning by law enforcement officers "provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S. at 444; see also *id.* at 468-470. A waiver is valid if it is the product of "a free and deliberate choice," and if it is made "with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran* v. *Burbine*, slip op. 7; see also *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979); *North Carolina* v. *Butler*, 441 U.S. 369, 374-375 (1979).

The question in this case is whether respondent effectively waived his *Miranda* rights in connection with the March 30 interview conducted by the ATF agents.[6] In our view, respondent's *Miranda* waiver plainly was valid. The agents administered the warnings required by *Miranda*, respondent indicated that

[6] Although none of the statements made by respondent during the March 30 interview were admitted at trial, the validity of the waiver is relevant because the Colorado Supreme Court indicated that respondent's May 26 statement might be suppressed on the ground that it was a "fruit" of the March 30 statement. The Colorado Supreme Court directed the trial court to determine the relationship between the two statements on remand. Pet. App. 18C-19C. Since the May 26 statement would not be subject to suppression if the March 30 statements were not obtained in violation of *Miranda*, a finding that respondent's March 30 waiver was valid would eliminate any question regarding the admissibility of the May 26 statement.

Even if the March 30 statements were obtained in violation of *Miranda*, however, the May 26 statement almost certainly would be admissible under this Court's decision in *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985). The Colorado Supreme Court left the *Elstad* issue to be resolved on remand (Pet. App. 19C, 30C n.6).

he understood the information conveyed in the warnings, and respondent voluntarily agreed to waive his right to remain silent and to answer the agents' questions. *Miranda* and its progeny make clear that this simple procedure is all that is required to obtain an effective waiver.

A. The Law Enforcement Officers' Administration Of The *Miranda* Warnings Supplied Respondent With All The Information He Needed To Make A Knowing *Miranda* Waiver

Prior to the March 30 interrogation, respondent twice was informed by law enforcement officers that he had a right to remain silent, that any statement he made could be used against him, and that he had a right to request a lawyer (Pet. App. 5A, 8C). The Colorado Supreme Court concluded that respondent's waiver nonetheless was ineffective because he was not informed in advance of all the subjects that would be covered in the proposed interrogation. It is well settled, however, that a police officer may obtain a valid waiver simply by conveying to a suspect the information contained in the *Miranda* warnings themselves; no additional information is required. The officers' precise compliance with *Miranda* in this case therefore was sufficient to supply respondent with the information necessary for an effective waiver.[7]

[7] This Court stated in *Moran* that a suspect must be "aware[]" of his rights in order to execute a valid waiver (slip op. 7). Thus, a *Miranda* waiver will not be effective if the suspect fails to comprehend the information contained in the warnings. This question must be evaluated by considering "the [suspect's] age, experience, education, background, and intelligence" (*Fare* v. *Michael C.*, 442 U.S. at 725). Nothing in the record in this case indicates that respondent failed to understand the information conveyed by the warnings.

1. This Court steadfastly has adhered to the view that the warnings prescribed by *Miranda* provide a suspect with all the information that he needs to decide whether to waive his rights. The *Miranda* Court itself noted that advising a suspect that his statements can be used against him will "make [the suspect] aware not only of the privilege, but also of the consequences of forgoing it" (384 U.S. at 469). Nowhere in the Court's comprehensive discussion of the warnings (*id.* at 467-474) is there even a hint that the police would be required to append ad hoc supplements to the warnings depending on the facts of each particular case.

Only last Term, this Court expressly reaffirmed that the warnings convey to a suspect all the information necessary for an effective *Miranda* waiver, stating that "[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." *Moran*, slip op. 8; see also *Fare* v. *Michael C.*, 442 U.S. at 718; *Michigan* v. *Mosley*, 423 U.S. 96, 99-100 (1975); *Michigan* v. *Tucker*, 417 U.S. 433, 443-444 (1974); cf. *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985), slip op. 12 ("[t]he warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will' ").

The conclusion that the warnings supply a suspect with all the information that is relevant under *Miranda* is a direct corollary of the principle upon which *Miranda* is based. The sole purpose of the warnings and other procedures mandated by *Miranda* is to

counteract the compulsion to speak that a suspect might feel as a result of custodial interrogation, thereby protecting the suspect's privilege against compelled self-incrimination. *Moran*, slip op. 6, 10-11; *Miranda*, 384 U.S. at 467. By reminding the suspect that he is entitled to refrain from speaking, and that if he chooses to answer questions he may provide information that can be used against him, the warnings fully counteract any such compulsion to speak. As this Court has recognized, "[i]t is inconceivable that [the *Miranda*] warning would fail to alert [a defendant] to his right to refuse to answer any question which might incriminate him. * * * Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *United States* v. *Washington*, 431 U.S. 181, 188 (1977); see also *Moran*, slip op. 13 ("as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process").

Respondent's waiver plainly satisfies this standard. The officers' recitation of the *Miranda* warnings expressly reminded respondent that he had a right to remain silent and that his statements could be used against him. The warnings thus fully informed respondent of the existence of his Fifth Amendment privilege and the consequence of abandoning that privilege.[8] Accordingly, the officers were not re-

[8] The requirement that a suspect be made "aware[] * * * of * * * the consequences of the decision to abandon [the privilege]" in order effectively to waive his right to remain silent (*Moran*, slip op. 7) does not justify a rule requiring the police to advise the suspect of the particular criminal activity that they are investigating. It could be argued that informing the

quired to provide respondent with information about the subject matter of the proposed interrogation in order to accomplish that goal.[9]

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suspect of the topics of the interrogation would in some general sense provide the suspect with information about the consequences of waiving his rights—he would learn the particular criminal activity in which he might implicate himself. However, the sole consequence of which a suspect must be informed for purposes of *Miranda* is that his statements can be used against him. Once he is aware of that fact, he understands "the consequences of forgoing [the privilege]." *Miranda*, 384 U.S. at 469; see also *Moran*, slip op. at 8, 9-10.

[9] The lower courts that have concluded that a suspect's knowledge of the subjects of the interrogation is relevant in assessing the validity of his *Miranda* waiver have formulated essentially two different standards. Some courts impose an obligation upon the police to provide this information, holding that the police must inform the suspect of the subject of the interrogation in every case. See, *e.g.*, *Schenk* v. *Ellsworth*, 293 F. Supp. 26, 29 (D. Mont. 1968). Other courts, including the court below (see Pet. App. 13C-17C), have cast the requirement in terms of the suspect's knowledge, holding that the suspect's awareness of the subject matter of the proposed interrogation must be considered in assessing the validity of the suspect's waiver. On this view, the police are not obligated to supplement the *Miranda* warnings as long as the suspect could have ascertained the subjects of the interrogation from his knowledge of the surrounding circumstances. See, *e.g.*, *Carter* v. *Garrison*, 656 F.2d 68, 70 (4th Cir. 1981), cert. denied, 455 U.S. 952 (1982); *United States* v. *McCrary*, 643 F.2d 323, 328-329 (5th Cir. 1981); see also *Collins* v. *Brierly*, 492 F.2d 735, 739 (3d Cir.) (en banc), cert. denied, 419 U.S. 877 (1974). Although the rules applied by these courts differ in their particulars, they rest upon the same basic legal conclusion—that the suspect's awareness of the subject of the interrogation is in some way relevant in assessing the validity of his *Miranda* waiver. For the reasons discussed in the text, this conclusion is incorrect.

Other courts have held that the validity of a suspect's waiver is unaffected by the suspect's lack of knowledge about the subjects of the proposed interrogation. See, *e.g.*, *United States* v. *Burger*, 728 F.2d 140, 141 (2d Cir. 1984); *United States* v. *Anderson*, 533 F.2d 1210, 1212 n.3 (D.C. Cir. 1976); *United States* v. *Campbell*, 431 F.2d 97, 99 n.1 (9th Cir. 1970). Courts also have rejected arguments that the *Miranda* warnings should be supplemented with other categories of information. See, *e.g.*, *United States* v. *Contreras*, 667 F.2d 976, 979 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *Harris* v. *Riddle*, 551 F.2d 936, 938-939 (4th Cir.), cert. denied, 434 U.S. 849 (1977); *United States ex rel. Placek* v. *Illinois*, 546 F.2d 1298, 1300 (7th Cir. 1976); *United States* v. *Hall*, 396 F.2d 841, 845-846 (4th Cir.), cert. denied, 393 U.S. 918 (1968).

The only possible reason for requiring the police to provide a suspect with this additional information is the justification advanced by the Colorado Supreme Court—that "a suspect's decision whether to consult with an attorney before answering questions will often be influenced by the seriousness of the matter underlying the interrogation" (Pet. App. 12C). However, just as this Court has made clear that the *Miranda* warnings convey to a suspect all the information needed for a valid waiver, the Court consistently has refused to require supplementation of the warnings on the ground that the additional information might be considered useful by a suspect in calculating whether it is in his self-interest to waive his rights. *Miranda* requires only that the suspect be made aware that he is free to choose between speaking and remaining silent; it is not concerned with the wisdom of that choice. Accordingly, the suspect must be supplied with information only when that information is necessary to make the suspect aware of his right to choose to remain silent.

In *Oregon* v. *Elstad*, *supra*, for example, the Court rejected the defendant's claim that his *Miranda*

waiver was not fully informed because he had not received an additional warning telling him that his previous confession was inadmissible. The defendant asserted that the additional information might have affected his decision whether to assert his right to remain silent. The Court stated that an additional warning was "neither practicable nor constitutionally necessary," and noted that it had "never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness" (*Oregon* v. *Elstad*, slip op. 17).

The Court reached the same result in *Moran* v. *Burbine*, *supra*, holding that a suspect need not be informed of the fact that an attorney had telephoned the police station to inquire about his case. It stated: "No doubt the additional information would have been useful to [the defendant]; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand by his rights" (slip op. 8).

This Court's decisions in *Elstad* and *Moran* compel the rejection of the Colorado Supreme Court's conclusion that a suspect must be aware of the subjects of the proposed interrogation in order effectively to waive his *Miranda* rights. An additional warning cannot be mandated on the ground that the information would be useful to the suspect because, as this Court has made clear, "*Miranda* [does not] require[] the police to inform a suspect of any and all information that would be useful to a decision whether to remain silent or speak with the police" (*Moran*, slip op. 18 n.4). Whether a suspect possesses such information accordingly is irrelevant in assessing the validity of his *Miranda* waiver.

The Court's decision in *United States* v. *Washington*, *supra*, provides additional support for this conclusion. The defendant in *Washington* received the *Miranda* warnings prior to testifying before a grand jury, but he argued that he also should have been told that he was a potential defendant. The Court rejected the claim that the *Miranda* warnings were inadequate to protect the defendant's Fifth Amendment privilege. It observed that "[e]ven in the presumed psychologically coercive atmosphere of police custodial interrogation, *Miranda* does not require that any additional warnings be given simply because the suspect is a potential defendant" (431 U.S. at 188). Since a suspect need not be provided with this information—which, like information about the topics of the interrogation, might inform him of the severity of his situation and thereby assist him in determining whether to assert his right to remain silent—the agents in this case were not required to supply respondent with any additional information in order to obtain a valid *Miranda* waiver.

2. Expanding the scope of the *Miranda* warnings to require that a suspect be informed in advance of the possible subjects of the interrogation is unwarranted for the additional reason that such a requirement would dramatically alter the balance struck by this Court in *Miranda* with respect to the constitutional constraints upon custodial interrogation. The Court has recognized that "[c]ustodial interrogations implicate two competing concerns" (*Moran*, slip op. 12). First, " 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting and punishing those

who violate the law." *Ibid.* (citations omitted); see also *Oregon* v. *Elstad*, slip op. 6; *United States* v. *Washington*, 431 U.S. at 186-187; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). Second, the Court has concluded that "the interrogation process is 'inherently coercive' and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion" (*Moran*, slip op. 12).

The Court reconciled these interests in *Miranda* by holding that "[p]olice questioning * * * could continue in its traditional form, * * * but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators" (*Moran*, slip op. 12). By requiring police officers to inform a suspect about the subject matter of the interrogation solely because that information is relevant to a suspect's calculation of his own self-interest in waiving or standing on his privilege, the rule adopted by the court below would "upset this [Court's] carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendment privilege and injurious to legitimate law enforcement" (*Moran*, slip op. 12-13).

Moreover, the rationale underlying such a rule would be virtually limitless—extending to any information possessed by police officers that might be relevant to the suspect's calculation of his self-interest. For example, the suspect's decision to waive his rights and consent to interrogation probably would be affected by the quality and quantity of information already possessed by the police concerning the suspect's involvement in the offense under investi-

gation, the legal elements of the offense, the likely penalties for the crime of which he is suspected, and the prosecutor's or judge's propensity to treat more leniently one who has cooperated in the investigation. In addition, police officers surely are aware that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances" (*Watts* v. *Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in the judgment)), and that fact also would most likely influence a suspect's decision. Under the test applied by the court below, the police could be burdened with the requirement of supplying suspects with all this information despite the fact that the information is irrelevant to the purpose of *Miranda*—to eliminate the compulsion presumed to be inherent in custodial interrogation and enable a suspect freely to decide whether to exercise his right to remain silent.

3. Finally, practical considerations counsel against the rule applied by the Colorado Supreme Court. This Court has emphasized "on numerous occasions, [that] '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application." *Moran*, slip op. 11; see also *Berkemer* v. *McCarty*, 468 U.S. 420, 430-432 (1984); *New York* v. *Quarles*, 467 U.S. 649, 663 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part); *Fare* v. *Michael C.*, 442 U.S. at 718 ("*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible").

The adoption by this Court of the Colorado Supreme Court's decision "would have the inevitable conse-

quence of muddying *Miranda*'s otherwise relatively clear waters" (*Moran*, slip op. 11). For example, would the police be required to inform a suspect of the conduct that is under investigation (*e.g.*, "a killing") or would they be required to list for the suspect each of the actual charges that might possibly be brought? A police officer's suspicion with regard to a particular offense could change in the course of an interrogation as the suspect revealed new information. Would the officer be required to interrupt his questioning to advise the suspect that he now was under suspicion for an additional offense? In addition, as the dissenting justices on the Colorado Supreme Court observed (Pet. App. 34C), "[p]rior to questioning a suspect, the police may have insufficient information to determine what charges will ultimately be filed against him. The nature of the offense may depend upon circumstances unknown to the police, such as whether the suspect has a criminal record. It may also turn upon an event yet to occur, such as whether the victim of the crime dies."

The uncertainty generated by the Colorado court's rule would not necessarily be confined to advising a suspect of the criminal activity that would be the subject of the interrogation. As we have discussed (see pages 20-21, *supra*), the principle embraced by the Colorado Supreme Court could be applied to require police officers to provide suspects with a range of other information that might be viewed as relevant to a suspect's calculation of his self-interest in deciding whether to waive his rights. A careful police officer therefore could no longer be sure that administration of the *Miranda* warnings would provide the predicate for a valid waiver. Instead, he would have to examine the facts of each case to determine whether

a court might later conclude that some piece of information would have been relevant to the suspect's decision. And a miscalculation in either direction could prove costly: if he erred in failing to supply the information, any confession he obtained would have to be suppressed; if he erred on the side of caution, his action could needlessly discourage the making of a statement and thwart successful investigation of a serious crime.

B. Respondent's Waiver Of His *Miranda* Rights Was Voluntary

The second aspect of the *Miranda* waiver inquiry is whether "the relinquishment of the right [was] voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception" (*Moran*, slip op. 7). The question is whether the waiver was the product of an "uncoerced choice" by the suspect (*ibid.*).

Nothing in the record in this case indicates that respondent's waiver was the result of physical or psychological pressure. The trial court found that "there was no element of duress or coercion used to induce [respondent's] statements on March 30, 1979" (Pet. App. 3A), and neither of the two state appellate courts questioned that determination. Respondent's waiver therefore was clearly voluntary. Cf. *Moran*, slip op. 7.[10]

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[10] Some courts have suggested that a waiver may not be "voluntary" if the suspect is not aware of the subjects of the proposed interrogation. See, *e.g.*, *Collins* v. *Brierly*, 492 F.2d at 739. However, the limitations upon a police officer's obligation to provide information to a suspect cannot be circumvented by the use of the "voluntariness" label; a waiver is not rendered involuntary by a police officer's failure to provide

Respondent intimates (Br. in Opp. 6) that his waiver was the product of a "deliberate intent to mislead [respondent] about the subject matter of the interrogation." In our view, nothing in the record supports the conclusion that the agents withheld information about the topics of the proposed interrogation as part of a deliberate effort to mislead respondent into waiving his Fifth Amendment privilege. Even if respondent were correct, however, that fact would not vitiate his *Miranda* waiver.

Miranda provides that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege" (384 U.S. at 476). The Court similarly observed in *Moran* that a waiver that is "the product of * * * intimidation, coercion or deception" is involuntary (slip op. 7). The context of each of these references to deception and trickery indicates that deception can render a *Miranda* waiver involuntary only when the deception amounts to the equivalent of coercion, precluding the suspect from making a free choice between waiving and standing on his rights. As we have discussed, that plainly was not the case here.

Police deception also would invalidate a waiver if it "deprive[d] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them" (*Moran*, slip op. 9). Thus, when the deception relates to the nature of the rights discussed in the warnings—if, for example, an officer tells a suspect that the suspect's

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a suspect with information that *Miranda* does not require the officer to convey. See page 25, *infra*. The voluntariness inquiry looks not to the extent of the suspect's knowledge, but to whether his choice was the product of coercion.

statement actually cannot be used against him—any resulting waiver would be invalid.

However, when the deception concerns facts extraneous to the information conveyed in the warnings—and does not amount to the equivalent of coercion—the deception cannot invalidate the suspect's waiver. In *Moran*, for example, the Court concluded that even if the police officers deliberately withheld from the defendant the fact that the defendant's attorney had telephoned the police station, their conduct did not constitute "the kind of 'trick[ery]' that can vitiate the validity of a waiver" (*Moran*, slip op. 9 (citation omitted)). That is because the officers' conduct did not affect the defendant's awareness of the information necessary to understand his rights—the information conveyed in the *Miranda* warnings. See *ibid.* (" 'deliberate or reckless' withholding of information * * * is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand his rights and the consequences of abandoning them").

In the present case, the agents failed to supply respondent with information—the topics of the proposed interrogation—that *Miranda* did not require them to provide. The limits upon a police officer's obligation to provide information to a suspect would be meaningless if the failure to supply extraneous information could constitute deception that vitiates a suspect's waiver. Instead, because "respondent's voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey, the waiver[] [was] valid" (*Moran*, slip op. 9-10).[11]

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[11] Although this case concerns a situation in which the claim of deception is based upon law enforcement officers'

For the foregoing reasons, it is clear that respondent acted with an awareness of both the nature of his privilege against compelled self-incrimination and the consequences of waiving that privilege when he voluntarily waived his *Miranda* rights prior to the March 30 interview. Respondent's waiver therefore was valid and the Colorado Supreme Court erred in concluding that *Miranda* required the suppression of respondent's voluntary statements.

Finally, to the extent that the lower court's ruling is based on due process considerations, the agents'

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failure to provide information to a suspect, the same test should apply in determining whether an affirmative misrepresentation by a law enforcement officer undermined the validity of a suspect's waiver. For example, an affirmative misrepresentation concerning the subjects of the proposed interrogation would not vitiate a suspect's waiver because it would affect only the suspect's calculation of his self-interest, and could not affect his comprehension of his right to remain silent. See, *e.g.*, *Commonwealth* v. *Forde*, 466 N.E.2d 510, 511-512 (Mass. 1984) (police officer's false statement that the defendant's fingerprints had been found on dead body did not vitiate *Miranda* waiver); *State* v. *Woods*, 117 Wis. 2d 701, 723-729, 345 N.W.2d 457, 468-471 (1984) (waiver not invalidated by police officer's misrepresentation of evidence against defendant); 1 W. LaFave & J. Israel, *Criminal Procedure* § 6.9(c), at 528-529 (1984); but see White, *Police Trickery In Inducing Confessions*, 127 U. Pa. L. Rev. 581, 611-614 (1979) (arguing that misrepresentation of the charges under investigation should invalidate a *Miranda* waiver). The basic constitutional standard governing police interrogation techniques—the Due Process Clause—already regulates the use of deception by police officers (see pages 27-28, *infra*). *Miranda* should not be read to impose additional restrictions upon the use of this interrogation technique by police officers as long as the deception does not affect the suspect's ability to understand and act upon his right to decline to answer a police officer's questions.

failure to inform respondent of the crimes that would be the subject of the interrogation plainly did not deprive respondent of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. The agents simply failed to provide respondent with information that might have affected his calculation of whether his self-interest weighed in favor of making a voluntary statement. That conduct "falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States" (*Moran*, slip op. 19). In *United States* v. *Washington*, *supra*, the defendant—in addition to claiming a violation of *Miranda*—argued that it would be "fundamentally unfair to elicit incriminating testimony from a potential defendant without first informing him of his target status" because this additional information would "alert the witness more pointedly" and assist him in deciding whether to invoke his privilege against compelled self-incrimination (431 U.S. at 190 n.6). The Court held that "[t]his line of argument simply restates respondent's claims under the Self-Incrimination Clause and is rejected for the same reasons," noting that there had been no showing of "any governmental misconduct which undermined the fairness of the proceedings" (*ibid.*). The same conclusion is appropriate here.

Even if the police withheld information as part of a plan to deceive respondent, their conduct would not amount to a violation of due process. The Due Process Clause does not prohibit all uses of deception in connection with police interrogation. *Frazier* v. *Cupp*, 394 U.S. 731, 737, 739 (1969); *Miller* v. *Fenton*, No. 83-5530 (3d Cir. June 26, 1986), slip op. 19-20; 1 W. LaFave & J. Israel, *supra*, § 6.2(c), at 446-447; see

also *Spano* v. *New York*, 360 U.S. 35 (1959) (police deception combined with other factors found to constitute interrogation technique violative of due process). The inquiry is whether the statements were obtained by "'techniques and methods offensive to'" fundamental fairness, under "circumstances in which the suspect clearly had no opportunity to exercise 'a free and unconstrained will.'" *Oregon* v. *Elstad*, slip op. 5 (citation omitted); see also *Miller* v. *Fenton*, No. 84-5786 (Dec. 3, 1985), slip op. 5, 12. The trial court in this case specifically found that respondent's statements were voluntary and not the product of improper coercion (Pet. App. 3A), and there is no evidence to the contrary. Therefore, the admission of the statements into evidence is not barred by the Due Process Clause.

CONCLUSION

The judgment of the Supreme Court of Colorado should be reversed with respect to the issue on which this Court granted certiorari.

Respectfully submitted.

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No. 85-1517

IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF COLORADO,
Petitioner,
v.
JOHN LEROY SPRING,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF GUAM, ILLINOIS, IOWA, LOUISIANA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, VERMONT, AND WYOMING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 85-1517

IN THE

Supreme Court of the United States

October Term, 1985

THE PEOPLE OF THE STATE OF COLORADO,
Petitioner,
v.
JOHN LEROY SPRING,
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INTEREST OF AMICI CURIAE

Twenty years ago in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Supreme Court ruled that the fruits of custodial interrogation had to be suppressed at

trial unless a defendant had been warned of his rights to silence and to counsel prior to interrogation. Throughout the years, the "prophylactic rules"[1] of *Miranda* have worked well. Indeed, the increased professionalism of police that has resulted from the decision has benefited both the police and prosecutors in preparing cases. Moreover, since *Miranda*, there are few claims of coerced confession in trials where the "coercion" involves police practices more abusive than violations of the *Miranda* rule itself. Due to the rigid, nontechnical guidelines set forth in *Miranda*, the range of police behavior has narrowed. *Miranda* has aided in the continuing pursuit of a lawful and just society.

Despite the clarity of *Miranda*, the Supreme Court of Colorado appends to the decision an additional requirement: an individual must be informed of the charges about which he is to be questioned prior to waiving his rights. The Supreme Court of Colorado has also imposed a duty of inquiry[2] on interrogating officers when a suspect, who has waived his rights and agreed to interrogation, refuses to answer a specific question. The amici curiae assert that the rulings of the Supreme Court of Colorado unnecessarily lessen the desired clarity of *Miranda* and serve to exclude reliable evidence in cases where a suspect's procedural or substantive rights have not been violated.

STATEMENT OF THE CASE

The Respondent, John Leroy Spring, was charged with the first degree murder of Donald Walker. At trial,

[1] *Michigan v. Tucker*, 417 U.S. 433, 444, 94 S.Ct. 2357, 2363-2364 (1974).

[2] The Supreme Court of Colorado ruled that once a suspect has indicated that he does not wish to answer a question or questions, interrogating officers have a duty to determine whether he is exercising his privilege against self-incrimination or is merely reluctant to answer particular questions.

evidence established that Walker was shot to death during an elk hunt, in February 1979, while in the company of the Respondent and Donald Wagner. At the site of the hunt, Walker was asked to walk ahead and to search a ravine for elk. Wagner asked the Respondent to shine a flashlight in the direction of Walker. Subsequently, Wagner not only fired a rifle shot that hit Walker in the head, but also approached him and fired a second shot which resulted in Walker's death.

The Respondent later informed George Dennison, an informant working with agents of the Federal Bureau of Alcohol, Tobacco, and Firearms (hereinafter, ATF) of the murder. Dennison related details of the murder, as well as, information regarding illegal firearm transactions to ATF agents. On March 30, 1979, the Respondent was arrested due to federal firearm charges. The Respondent, twice advised of his *Miranda* rights, signed a waiver of rights form. The Respondent was not informed of the subject matter of the impending interrogation. At the conclusion of the interrogation concerning firearm violations, the Respondent was questioned about the murder. The Respondent denied presence in Colorado and involvement in the murder.

Soon after, the Respondent was charged with murder and entered a plea of guilty to a federal firearms violation. On July 13, 1979, ATF agents visited the Respondent, incarcerated in a Kansas City jail. After being advised of his *Miranda* rights and told that he had the right to cease questions at any time, the Respondent acknowledged that he understood his rights, but refused to sign a waiver of rights form without first consulting an attorney. As the agents prepared to leave, the Respondent decided to talk with them.

Thereafter, a discussion commenced regarding firearms and explosives, the Respondent's activities in Colorado, the Colorado murder, and other crimes of which the Respondent was a suspect. The Respondent was again

advised of the option to cease questions. When the Respondent declined to talk about the Walker murder, the agents changed the subject matter of the questions. The Respondent, however, told the agents that a .22 caliber gun that he possessed at the time of his arrest had been removed from Walker at his death. The Respondent was later convicted of first degree murder, sentenced to life imprisonment, and later appealed his conviction.

The Court of Appeals of Colorado reversed the Respondent's conviction on the basis that the March 30, 1979 and July 13, 1979 statements were taken in violation of the Respondent's constitutional rights and that the State had failed to establish that a statement given on May 26, 1979 was not the fruit of the March 30 statement. Because the Respondent was not informed, prior to the March 30 and July 13 interviews of the subject matter of the interrogations, his waivers were not knowingly and intelligently given. The Court of Appeals also ruled that the agents, on July 13, improperly continued to question the Respondent about the murder after he informed them that he did not want to talk about the subject.

The Supreme Court of Colorado affirmed the decision of the Court of Appeals by ruling that the State failed to prove that the Respondent made a knowing, intelligent, and voluntary waiver of rights since he was not informed of the subject matter of the interrogations prior to the interviews. The Supreme Court also ruled the July 13 statement inadmissible because "[o]nce the defendant has indicated in any way that he does not want to answer a question or questions, the interrogating officers have an affirmative and emphatic duty to determine whether the suspect is in fact exercising his privilege against self-incrimination in all respects, or is merely reluctant to answer particular questions."

ARGUMENT

A.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Supreme Court set forth a "bright line" test of admissibility which focused on the application of the Fifth Amendment privilege against self-incrimination to in-custody interrogation: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444, 86 S.Ct. at 1612. The Supreme Court directed police to provide "procedural safeguards" when the suspect was in custody and prior to interrogation. The procedures required that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444, 86 S.Ct. at 1612.[3] The Court determined that a confession obtained during custodial interrogation and in the absence of *Miranda* warnings conclusively would be presumed the result of police coercion. Because such a confession was presumed involuntary, it was inadmissible.

In order to provide "concrete constitutional guidelines for law enforcement agencies and courts to follow,"[4] the case-by-case examination of police interrogation methods was replaced by a concise requirement that the prescribed warnings be given. As the *Miranda* Court stated, "[a]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than

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[3] The Court also stated that "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently." *Id.*

[4] *Id.* at 442, 86 S.Ct. at 1611.

speculation; a warning is a clear-cut fact." *Id.* at 468-469, 86 S.Ct. at 1624-1625.

It is clear that *Miranda* does not explicitly require that a person in custody be informed of the charges which the police are investigating. The language in *Miranda* is painstakingly specific regarding the basic constitutional rights which the police must advise a suspect prior to questioning. *Id.* at 467-479, 86 S.Ct. at 1624-1630, *Carter v. Garrison*, 656 F.2d 68, 70 (4th Cir. 1981)(per curiam) *cert. denied*, 455 U.S. 952, 102 S.Ct. 1458 (1982), *United States v. Burger*, 728 F.2d 140 (2nd Cir. 1984). Indeed, there is no indication in *Miranda* that there must be a warning given to a suspect concerning the nature of the crime which led to the interrogation conference, the possible penalty, the elements of the offense, and other similar matters. *Miranda* requires that an accused be advised of his rights so that he may make a rational decision; not necessarily the best decision or one that would be reached only after long and arduous deliberation.

Moreover, in *Moran v. Burbine*, No. 84-1485 (U.S. March 10, 1986), a suspect was not informed that an attorney, retained by his relatives, was available to him. The Court ruled that *Miranda* did not mandate the authorities to so inform the suspect:

> No doubt, the additional information would have been useful to the respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

Accord, Oregon v. Elstad, ___ U.S. ___, ___, 105 S.Ct. 1285, 1297 (1985). Further, the Court in *Berkemer v. McCarty*, ___ U.S. ___, 104 S.Ct. 3138 (1984), indicated that the police need not inform a suspect, prior to questioning, what the precise nature of the charges may be. The Court refused to accord the *Miranda* procedural

safeguards based upon a felony misdemeanor distinction since police are often unaware at the time of the arrest whether the arrestee committed a misdemeanor or a felony. It would, therefore, be unreasonable to require police to determine the nature of the offense as a condition precedent to proper police procedure. *Id.*, 104 S.Ct. at 3146. Also, as noted in *Collins v. Brierly*, 492 F.2d 735, 739 (3d Cir. 1974) *cert. denied*, 419 U.S. 877, 95 S.Ct. 1401 (1974), the waiver of *Miranda* rights does not compel a suspect to answer questions. When questioning progresses to an area of illegal conduct, the person being interrogated may refuse to answer.

Finally, the amici curiae submit that the rule imposed by the Supreme Court of Colorado would severely impair the efforts of law enforcement officers who often do not know what laws have been violated until an investigation is complete. As written, *Miranda* strikes the proper balance between society's legitimate law enforcement interests and the protection of a defendant's Fifth Amendment rights.

B.

The waiver of *Miranda* rights by a person being interrogated is not irrevocable. *Miranda* and its progeny allow an interrogee to withdraw his waiver and fully assert his Fifth Amendment rights in the midst of the interrogation process. In *Miranda*, the Supreme Court stated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning,

> the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Miranda v. Arizona, 384 U.S. 436, 473-474, 86 S.Ct. 1602, 1627-1628. It is also settled that a suspect may selectively waive his Fifth Amendment rights by indicating that he will respond to some questions, but not to others. Under *Miranda*, once a person in custody indicates that he wishes to remain silent, the interrogation must cease. The Supreme Court, however, rejected this literal interpretation of *Miranda* by ruling that the exercise of the right to remain silent does not preclude all further questioning. *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321 (1975). In *Mosley*, the Supreme Court refined its *Miranda* holding as follows:

> A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . ." 384 U.S. at 479, 86 S.Ct. at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." *Id.* at 474, 86 S.Ct. at 1627. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting.

Mosley, 423 U.S. at 102, 96 S.Ct. at 326. In the instant case, the Supreme Court of Colorado ruled that interrogating officers have an affirmative duty to determine if a suspect is exercising his privilege against self-incrimination or is merely reluctant to answer particular questions when a suspect indicates that he does not wish to answer a question or questions. The amici curiae submit that this duty of clarification not only unduly restricts police, but also creates uncertainty.

The additional requirement which the Colorado Supreme Court has imposed on its state police officers is elusive, procedurally ineffective, and generates intolerable uncertainty. Under the Colorado requirement, police must carefully assess each word spoken by an interrogee in case that a later review of a record of proceedings may reveal words, arguably ambiguous, which possibly show a desire to remain silent. This requirement also necessitates a case-by-case review which involves a balancing of variables including the behavior of the police and the subjective attributes of the suspect.

Further, the Colorado rule unnecessarily blurs the *Miranda* requirements. Indeed, an interrogee's willingness to answer certain questions and refusal to speak when he does not so desire evidences an understanding of his rights and his ability to discern those areas in which he chooses to preserve his silence. The imposition of the Colorado requirement would risk the gains represented by *Miranda v. Arizona*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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No. 85-1517

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STATE OF COLORADO,
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JOHN LEROY SPRING,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE RESPONDENT BY THE COLORADO CRIMINAL DEFENSE BAR, INC.

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QUESTION PRESENTED

Whether the Colorado Supreme Court correctly applied the totality of the circumstances standard in determining that the Prosecution had not met its burden to establish a valid *Miranda* waiver.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No. 85-1517

—o—

In The
Supreme Court of the United States
October Term, 1986

—o—

STATE OF COLORADO,
Petitioner,

v.

JOHN LEROY SPRING,
Respondent.

—o—

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

—o—

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE RESPONDENT BY THE COLORADO CRIMINAL DEFENSE BAR, INC.

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I.

INTRODUCTION

Defendant-Respondent was the defendant in the trial court and will be referred to by name or as "Defendant."

Petitioner will be referred to as the "Prosecution" or the "State." A recitation of the pertinent facts has been adequately set forth by the Respondent and is here adopted. References to the record will be to the Joint Appendix ("J.A.") filed with this Court.

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II.

INTEREST OF THE COLORADO CRIMINAL DEFENSE BAR

The issue in this case is whether the Colorado Supreme Court correctly applied the applicable law in determining that under the totality of the circumstances the Prosecution had not met its burden of proof that Mr. Spring had validly waived his rights prior to interrogation. The Court's resolution of whether the Colorado Court applied the correct legal standard is likely to have a significant effect on the procedure utilized by law enforcement officers for questioning criminal suspects as well as on the resolution of suppression issues by the courts.

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III.

SUMMARY OF THE ARGUMENT

The prosecution in a criminal case may not introduce statements elicited from a defendant during custodial interrogation unless it demonstrates that the defendant was adequately warned of his *Miranda* rights and thereafter

voluntarily waived those rights with an understanding of the nature and consequences of the waiver. In evaluating whether the prosecution has met its burden to show a valid waiver, the court must scrutinize the particular facts and circumstances of each case and base its decision on the totality of the circumstances. One of the circumstances that the court should consider is the defendant's knowledge of the nature of the investigation about which he is being interrogated. The court may consider the nature of the advisal, defendant's actual knowledge of the investigation and, if applicable, the agents' deception or withholding of information concerning the nature of the investigation.

Petitioner and the United States have mischaracterized the holding below as adopting a *per se* rule that suspects must be advised of all possible subjects of interrogation prior to custodial interrogation. To the contrary, the Colorado Supreme Court correctly applied the totality of the circumstances standard when it evaluated Defendant's March 30, 1979 statement to Federal Bureau of Alcohol, Tobacco, and Firearms ("ATF") agents. The Colorado Court's conclusion that Mr. Spring was not adequately advised of the nature of the inquiry and that, therefore, his March 30th statements about the Colorado homicide must be suppressed, is supported by the law and the evidence in this case and should be upheld.

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IV.

ARGUMENT

THE COLORADO SUPREME COURT UTILIZED THE CORRECT LEGAL STANDARD IN DETERMINING THAT UNDER THE TOTALITY OF THE CIRCUMSTANCES THE PROSECUTION HAD NOT MET ITS BURDEN TO ESTABLISH A VALID MIRANDA WAIVER BY DEFENDANT

The Fifth Amendment of the United States Constitution prohibits use by the prosecution of statements elicited during custodial interrogation of a defendant unless the prosecution demonstrates that the defendant was adequately warned of his privilege against self-incrimination and his right to counsel and thereafter waived those rights. *Miranda v. Arizona,* 384 U.S. 436 (1966). The requirement that suspects be advised of their *Miranda* rights prior to interrogation is based on this Court's recognition of the inherent compulsion and compelling pressures exerted upon individuals subject to custodial interrogation. *Moran v. Burbine,* 106 S.Ct. 1135, 1141 (1986). Any waiver of these rights must be knowing, intelligent and voluntary, and must be made with an understanding of the consequences of the waiver. "It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." *Miranda v. Arizona, supra,* 384 U.S. at 469.

The validity of a suspect's waiver of *Miranda* rights must be evaluated on the basis of "the totality of the circumstances surrounding the interrogation. . . ." *Fare v. Michael C.,* 442 U.S. 707, 725 (1979) citing *Miranda v. Arizona, supra* at 475-77; *North Carolina v. Butler,* 441 U.S. 369, 374-75 (1979). *See Schneckloth v. Bustamonte,* 412

U.S. 218, 226 (1973). In *Johnson v. Zerbst,* 304 U.S. 458 (1938) this Court determined that the validity of a waiver depends upon "the particular facts and circumstances surrounding that case including the background, experience and conduct of the accused." 304 U.S. at 464. This Court recently reaffirmed application of the totality of the circumstances test to evaluate the validity of a *Miranda* waiver.

> The inquiry has two distinct dimensions. First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. (citations omitted)

Moran v. Burbine, supra at 1141.

One of the factors which should be considered by the courts in applying this standard is whether, and to what extent, a suspect is aware of the subject matter under investigation prior to his interrogation. *See Carter v. Garrison,* 656 F.2d 68, 70 (4th Cir. 1981) (per curiam); *United States v. McCrary,* 643 F.2d 323, 328-29 (5th Cir. 1981); *United States ex rel. Henne v. Fike,* 563 F.2d 809, 813-14 (7th Cir. 1977); *Collins v. Brierly,* 492 F.2d 735, 738-40 (3rd Cir. 1974) (en banc), *cert. denied,* 419 U.S. 877 (1974). *See also,* 18 U.S.C. 3501(b) (in determining voluntariness of confession, judge shall consider among other factors whether the defendant knew the nature of the offense).

Petitioner has framed the issue before this Court in a misleading fashion. Contrary to the argument made by Petitioner in its opening brief, the Colorado Supreme Court did not conclude that, prior to interrogation, a suspect must be advised of all the possible subjects of interrogation or that a subject must be advised of the exact nature of the charge for which he is a suspect.[1] Instead, the Court applied the totality of the circumstances test and specifically held that whether the suspect is informed of the subject matter of the interrogation is not determinative of the validity of his *Miranda* waiver.

> We believe it to be more consistent with standards governing the validity of a waiver to consider the extent of the suspect's understanding of the subject matter, and the source of that understanding, simply as factors in the totality of circumstances surrounding the making of a statement. We decline to elevate those considerations into an absolute rule that renders any waiver automatically invalid when the interrogated suspect has not been informed of the subject matter of the questioning prior to its commencement.

People v. Spring, 713 P.2d 865, 873-74 (Colo. 1985). The Colorado Supreme Court's rejection in *Spring* of a *per se* rule and adoption of the totality of the circumstances test is evidenced by its opinions in subsequent decisions. In *Jones v. People*, 711 P.2d 1270 (Colo. 1986) the court refused to suppress statements on the ground that the defendant had not been advised of, and was unaware of, the

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[1] The United States in its amicus brief likewise misrepresents the holding below by stating "[t]he Colorado Supreme Court concluded that Respondent's waiver nonetheless was ineffective because he was not informed in advance *of all the subjects that would be covered in the proposed interrogation.*" Brief of the United States at 13. (emphasis added)

nature of the investigation at the time of his *Miranda* waiver and interrogation. The court recently reaffirmed its adherence to the totality of the circumstances standard in *People v. Longoria*, 717 P.2d 497 (Colo. 1986) and *People v. Chase*, 719 P.2d 718 (Colo. 1986) stating that "the validity of a waiver must be based on the totality of the circumstances surrounding the making of the statement" and that "no one factor is determinative, but each one is important and should be appropriately considered." *Id.* at 721. Thus, the Petitioner's framing of the issue and its argument to this Court are based on an erroneous interpretation of the basis for the Colorado Supreme Court's decision in *People v. Spring, supra.*

The State bears a heavy burden to show a valid waiver of *Miranda* rights by a defendant and the courts should " 'indulge every reasonable presumption against waiver.' " *Johnson v. Zerbst, supra* at 464 *quoting Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937). The courts will not " 'presume acquiescence in the loss of fundamental rights,' " *Johnson v. Zerbst, supra*, 304 U.S. at 464 *quoting Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292, 307 and "[s]ince the state is responsible for establishing the isolated circumstances under which the interrogation takes place . . . the burden is rightly on its shoulders." *Miranda v. Arizona, supra*, 384 U.S. at 475.

As *Miranda* and its progeny make clear, any evidence that a defendant was tricked or misled about the facts and circumstances surrounding the interrogation or about the consequences of his waiver will demonstrate that he did not voluntarily waive his privilege against self-incrimination. *Moran v. Burbine*, 106 S.Ct. 1135, 1158 (Stevens, J. dis-

senting); *Miranda v. Arizona, supra,* 384 U.S. at 476. *See Police Trickery in Inducing Confessions,* 127 U.Pa. L. Rev. 581 (Jan. 1979).

In the case at bar, it is undisputed that the federal ATF agents who arrested Defendant on March 30, 1979, were aware of his alleged involvement in the Colorado homicide at the time of the arrest and, moreover, they considered Mr. Spring to be a suspect in that murder. Mr. Spring was arrested in Kansas during a sale of stolen firearms to undercover agents specializing in the detection of such crimes. Although his arrest and advisement related solely to the firearms' charges, the federal agents specifically and deliberately questioned Mr. Spring about the Colorado homicide without informing him that he was a suspect. Agent Patterson's manner of broaching the Colorado murder during the March 30th interview was a deliberate attempt to take Mr. Spring by surprise and elicit incriminating statements about the Colorado case. After questioning him generally about the weapons charge, Agent Patterson asked Mr. Spring about his involvement as a juvenile in the shooting of his aunt and then asked him if he had ever shot anyone else. (J.A., pp.49-50) The agent then proceeded to question Mr. Spring further about the Colorado homicide. (J.A., p.50)

The federal agents' failure to advise Mr. Spring that he was a suspect in the Colorado homicide was aggravated by several factors which the Colorado Supreme Court considered in its decision. The agents conducting the interrogation were specialized federal officers who would not normally be involved in a homicide investigation from a distant state jurisdiction. They had arrested Mr. Spring the same day for unrelated and, relatively, less serious

criminal activity. The record reveals a lack of any basis from which to conclude that Mr. Spring, at the time he waived his *Miranda* rights, reasonably could have expected that as a consequence of his waiver, he would be interrogated about a Colorado homicide. *Compare Carter v. Garrison, supra,* (waiver upheld where defendant was advised that investigation involved a possible break-in and was later questioned about a homicide; burglary and homicide involved the same criminal episode at the same location and defendant was informed of the homicide twenty minutes before he made incriminating statements); *Jones v. People, supra,* (failure of police to advise defendant he was a suspect in a homicide did not invalidate waiver where defendant was advised concerning motor vehicle theft and the vehicle at issue was stolen from the homicide victim as part of the same criminal episode).

Under the particular facts and circumstances of this case, the Colorado Supreme Court correctly found that Mr. Spring did not voluntarily waive his Fifth Amendment privilege with regard to the murder charge and that he was not properly advised of the consequences of his waiver.

> It is indisputed that a waiver of the right to remain silent and the right to counsel must be made knowingly, intelligently and voluntarily in order to be effective . . . . (cites omitted) It is difficult to discern how a waiver of these rights could be knowing, intelligent and voluntary where the suspect is totally unaware of the offense upon which the questioning is based.
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> A valid waiver of constitutional rights does not occur in a vacuum. A waiver of the right to counsel and right to remain silent occurs in response to a particular set of facts involving a particular offense. The *Miranda* warnings are given not solely to make the

suspect aware of the privilege, but also the consequences of foregoing the privilege.

United States v. McCrary, 643 F.2d 323, 328-29 (5th Cir. 1981); *see also Schenk v. Ellsworth,* 293 F.Supp.26 (D. Mont. 1968), where the court held that the defendant could not exercise a knowing and voluntary waiver of his *Miranda* rights where he was not told that he was a suspect in his wife's murder.

In *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866 (1981) this Court held that prior to an in-custody court ordered psychiatric competency examination, an accused must be advised of his *Miranda* rights "and the possible use of his statements," namely their possible use in the penalty phase of the capital trial — before the statements can be admitted as evidence at the penalty phase. While the Court did not specify the exact warning which must be given, it is clear that advisement of *Miranda* rights alone is not sufficient to insure a valid waiver where the context of the advisement does not support the conclusion that the suspect understood the consequences of the waiver. This focus on whether a defendant is aware of the consequences of his waiver necessitates preservation of the totality of the circumstances standard and rejection of the *per se* rule urged by the Prosecution.

Contrary to the Government's argument, this Court's decisions in *Moran v. Burbine, supra,* and *Oregon v. Elsted,* — U.S. —, 105 S.Ct. 1285 (1985) do not require rejection of the totality of the circumstances standard or limit the obligation of law enforcement officers to a simple recitation of *Miranda* rights. To the contrary, this Court explicitly reaffirmed its previous holdings that the prosecu-

tion must prove a voluntary waiver made with a full awareness and understanding of the consequences of that waiver prior to the admission of a defendant's statements at trial. *Moran v. Burbine, supra,* 106 S.Ct. at 1141. The Colorado Supreme Court's conclusion that the Prosecution failed in its burden to show that Defendant understood the nature and consequences of his waiver on March 30, 1979, is amply supported by the evidence and should be affirmed.

In its amicus brief, the United States argues that the Colorado Supreme Court's decision in *Spring* would place an undue burden on police officers by requiring them to inform suspects of the general nature of the investigation and would undermine the principle advantage of the *Miranda* rule — its simplicity and clarity of application. This argument ignores the plain meaning of *People v. Spring, supra,* wherein the Colorado Supreme Court follows traditional federal interpretation of the *Miranda* rule and applies a totality of the circumstances test. Analyzing the Government's argument in the context of this case, it is clear that on March 30, 1979, the federal ATF agents were equally aware that Mr. Spring was a suspect for firearms violations and for a homicide in Colorado. With equal ease they could have advised Mr. Spring that he was a suspect in either or both offenses. Instead, they elected to only advise him concerning the firearms investigation but to interrogate him about both crimes. *See Moran v. Burbine, supra* (Stevens, J. dissenting), 106 S.Ct. at 162-63 n.48. Adoption of the *per se* rule advocated by the Prosecution would condone the use of *Miranda* by law enforcement agents to trick an unsuspecting defendant concerning the nature of the investigation. This is particularly offensive in light of the origin of the required advisal which

is based on this Court's recognition of the inherent compulsion and pressures of custodial interrogation. *Moran v. Burbine, supra; Miranda v. Arizona, supra.*[2]

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V.

CONCLUSION

A valid waiver of *Miranda* rights requires proof by the prosecution that defendant acted with full understanding of the nature of the rights being waived and the consequences of the waiver. The Colorado Supreme Court correctly analyzed Defendant's waiver in light of the totality of the circumstances and the particular facts and circumstances of this case including the investigating agents' deliberate decision not to advise Mr. Spring that he was a suspect in a homicide. Contrary to the State's assertions, the Colorado Court did not adopt a *per se* rule that suspects must uniformly be advised of the specific nature of the investigation prior to interrogation. Therefore, the judgment of the Supreme Court of Colorado should be affirmed.

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[2] In *Moran v. Burbine, supra,* the majority of this Court carefully distinguished deceptive police activities aimed at a defendant's attorney as opposed to direct deception of the defendant. Although the distinction was rejected by three members of this Court, *see Moran v. Burbine, supra,* 106 S.Ct. at 1162-64 (Stevens, J. dissenting), it is inapposite in this case because the agents withheld information about the homicide investigation directly from Mr. Spring.

Dated this 17th day of September, 1986.

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